

September 30, 2011

VIA ELECTRONIC FILING

Neil Thomson  
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Law, Land Regulatory Affairs  
2025 Victoria Ave.  
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Re: *North American Electric Reliability Corporation*

Dear Mr. Thomson:

On this day, the North American Electric Reliability Corporation (“NERC”) filed with the Federal Energy Regulatory Commission (“FERC”) Petition Requesting Approval of New Enforcement Mechanisms and Acceptance of Initial Information Filing Regarding NERC’s Efforts to Refocus Implementation of its Compliance Monitoring and Enforcement Program. This filing proposes to change the process by which lesser risk (minimal to moderate risk) infractions of NERC Reliability Standards are processed in order to enable registered entities subject to the Reliability Standards, the Regional Entities, NERC and FERC to focus substantially greater resources and attention on matters that pose a more serious threat to reliability of the BPS. This new approach is designed for compliance matters within the United States. The FERC filing is attached to this letter.

As the attached filing explains, NERC is going to employ a more comprehensive and integrated risk control strategy that differentiates and addresses compliance issues in three groups according to their significance to the reliability of the BPS. Compliance issues will be identified, prioritized and addressed as follows:

- Group I (Lesser Issues) – the emphasis will be on identifying Possible Violations and ensuring they are corrected, without subjecting the registered entity to the full panoply of the Compliance Monitoring and Enforcement Program. Upon correction and submittal of registered entity’s statement of completion of mitigating activities, such Possible Violations will become, and be referred to as, remediated issues. Remediated issues will be included in a “Find, Fix, Track and Report” (FFT) spreadsheet format provided monthly to FERC as an informational filing. The submittal to FERC of the informational filing will conclude NERC and Regional Entity processing of remediated issues.

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- Group II (More Serious Possible Violations) – NERC and the Regional Entities will use more streamlined processing techniques, such as a spreadsheet Notice of Penalty (NOP) that contains all of the information relevant to processing a violation without the need for duplicative, voluminous records.
- Group III (Most Serious Possible Violations) – NERC, the Regional Entities and the industry will devote more resources to dealing with violations that either have caused serious consequences or present the risk of causing serious consequences.

Beginning in September, there will be three possible tracks for dealing with compliance matters: NOP; FFT; and dismissals. All matters included either in an FFT or NOP (spreadsheet or otherwise) must be fixed. FFTs have to be fixed and registered entities must submit a statement of completion of mitigation activities to the applicable Regional Entity prior to inclusion in an FFT informational filing. Spreadsheet NOP items must be fixed but need not be fixed prior to filing.

The registered entity must provide a statement of completion of mitigation activities and they are subject to verification by the Regional Entity. Mitigation activities must be described in the FFT or NOP spreadsheet. However, a separate, formal mitigation plan will not be required for FFT remediated issues and may not be required for spreadsheet NOPs. They will be required for Possible Violations in Full NOPs. Registered entities must still comply with timing requirements for submittal of mitigation activity information set forth in the NERC Rules of Procedures, to the extent applicable. NOPs will be filed for those matters posing a more serious risk to reliability of the BPS. They may be filed either in a spreadsheet format or a full NOP format. The spreadsheet NOP format is adapted from the Administrative Citation Process NOP and has been expanded to ensure the requisite level of detail and information is provided so an informed decision on the merits can be made.

Please contact the undersigned if you have any questions.

Respectfully submitted,

/s/ Rebecca J. Michael

Rebecca J. Michael

*Associate General Counsel for Corporate and Regulatory  
Matters  
North American Electric Reliability Corporation*

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

North American Electric Reliability Corp.            )

Docket No. RC11-\_-000

**PETITION REQUESTING APPROVAL OF NEW ENFORCEMENT MECHANISMS  
AND SUBMITTAL OF INITIAL INFORMATIONAL FILING REGARDING  
NERC’S EFFORTS TO REFOCUS IMPLEMENTATION OF ITS  
COMPLIANCE MONITORING AND ENFORCEMENT PROGRAM**

The North American Electric Reliability Corporation’s (“NERC”) mission is to ensure and improve the reliability of the bulk power system (“BPS”). Reliability excellence is achieved through the ongoing identification, correction and prevention of reliability risks, both big and small. Yet, accountability for reliability excellence is broader than just penalizing violations.

This filing describes NERC’s decision to shift how it deals with Possible Violations that pose lesser risks to the BPS. Toward this end, NERC and the Regional Entities are employing a more comprehensive and integrated risk control strategy that differentiates and addresses compliance issues according to their significance to the reliability of the BPS. In addition, NERC and the Regional Entities are increasing the utilization of their inherent enforcement discretion in the implementation of compliance and enforcement activities.

This new initiative is not about *whether* Possible Violations should or will be addressed. In all cases and regardless of the filing format, such matters are expected to be found, fixed, tracked and reported to the Regional Entities, NERC and the Federal Energy Regulatory Commission (“FERC” or “Commission”). Lesser risk issues that have been corrected will be presented as Remediated Issues in a Find, Fix, Track and Report (“FFT”) spreadsheet format that will be submitted to FERC in an informational filing on a monthly basis. More serious risk

violations will be submitted in a new Spreadsheet Notice of Penalty (“NOP”) or Full NOP, as warranted.

NERC believes this new approach is fully consistent with NERC’s existing rules and authority and the Commission’s rules, orders and regulations; however, to the extent the Commission believes otherwise, NERC requests waiver of such rules, regulations and orders to put this new initiative and associated reporting tools in place starting now. Specifically, NERC requests that the Commission notice this filing for public comment and issue an order approving the compliance enforcement initiative and mechanisms described herein and providing any additional guidance that the Commission believes is appropriate. Additionally, NERC is submitting its first informational filing of Remediated Issues as an attachment to this filing. NERC is not requesting Commission action on the FFT informational filing itself.

NERC is concurrently filing NOPs in the new Spreadsheet NOP format as well as others as Full NOPs. It is NERC’s expectation that the Commission will process all of those NOPs in accordance with the Commission’s regulations set forth in 18 C.F.R. Part 39.7. While NERC describes the new Spreadsheet NOP format herein, NERC requests that the Commission take action on the Spreadsheet NOP format and specific Spreadsheet NOP violations in the NP11-270-000 docket, rather than this docket.

NERC commits to report back to the Commission and industry stakeholders at six months and one year following this initial filing on experience gained and the results from implementation of the new mechanisms and tools.

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#### **List Of Attachments**

- 1. Summary Description of FFT**
- 2. Initial FFT Informational Filing of Remediated Issues**
- 3. Notice of Filing**

## **I. Executive Summary**

In the first four years as an enforcement organization, the Compliance Monitoring and Enforcement Program (“CMEP”) implemented by NERC and eight Regional Entities has been very successful in transitioning the industry from voluntary compliance to mandatory compliance with NERC Reliability Standards. This initiative represents an evolution of this process.

Commencing with this compliance enforcement initiative filing, there will be three tracks for dealing with possible compliance matters: (i) NOPs; (ii) FFT informational filings; and (iii) dismissals. Decisions regarding the proper disposition will be based upon consideration of the following factors: (1) the underlying facts and circumstances, including what happened, why, where and when; (2) the Reliability Standard at issue; (3) the applicable Violation Risk Factor (“VRF”) and Violation Severity Level (“VSL”); (4) the potential and actual level of risk to reliability, including mitigating factors during pendency of the Possible Violation; (5) the Registered Entity’s compliance program, including preventive and corrective processes and procedures, internal controls and culture of compliance; and (6) the Registered Entity’s compliance history. Moreover, a Regional Entity’s determination that a penalty or sanction is warranted and the deterrence value of a penalty or sanction also will be considered.

A key feature of this initiative is a change in the way lesser risk issues of NERC Reliability Standards are processed in order to enable Registered Entities subject to the Reliability Standards, the Regional Entities, NERC and the Commission to focus on more serious risk issues. Until today, lesser risk issues have been treated in essentially the same fashion as more serious violations, consuming time and resources disproportionate to the risk posed to reliability.

This is not reasonable or efficient, and the consequences are detrimental to reliability. Specifically, employees of Registered Entities have become focused on the minutia of compliance and penalty avoidance rather than on best practices and excellence. Those who draft Reliability Standards have become focused on avoiding what they view as compliance pitfalls. Status quo processing requirements will continue to produce the results we now have: (i) little to no differentiation of process treatment until the filing stage; (ii) significant paperwork, man-hour and administrative burdens for lesser risk issues; (iii) lengthy processing times for all issues; (iv) delays in information dissemination and transparency; and (v) potentially unintended signals and results that industry stakeholders should manage compliance risks rather than reliability risks.

As a result, it is imperative that CMEP implementation efforts be reevaluated, redirected and rebalanced to ensure that reliability is maintained and enhanced in accordance with NERC's mission. This initiative promotes reliability excellence by ensuring all issues are fixed and by enabling substantially greater resources and attention to be devoted to matters that pose a more serious threat to reliability of the BPS. It facilitates efforts to: (i) identify other unknown and unmitigated risks, (ii) address known serious risks; and (iii) discern trends and patterns that warn of impending risks of harm. It also aligns record development and resolution based on the risk posed, thereby reducing undue administrative and regulatory burdens on Registered Entities and improving caseload processing. As part of this initiative, NERC will continue to compile trend data and keep historical records on Registered Entities, which will allow NERC to target areas for increased education and attention as needed.

Under the process proposed in this filing, lesser risk issues will be found, fixed, tracked and reported to Regional Entities, NERC and FERC, instead of being processed in a NOP as violations subject to penalties or sanctions. Those responsible for enforcement must exercise the



discretion to determine that, once fixed, no additional compliance resources will be expended on a particular matter, given other demands and priorities. Therefore, the formal regulatory process will be used for violations that pose a more serious threat to the reliability of the BPS and will not be clogged up by lesser risk issues that have already been fixed.

Records will be kept of all find and fix actions to be sure that the process is being properly implemented. Once fixed and the Registered Entity has provided the Regional Entity with a statement of completion of mitigation activities, NERC and the Regional Entity will consider the Possible Violation to be a Remediated Issue. Inclusion of the Remediated Issue in an informational filing supplied to FERC on a monthly basis will conclude the processing of that Remediated Issue by NERC and Regional Entities, subject to verification at an Audit, Spot Check, random sampling or otherwise, as warranted.

Another key feature of this initiative is a refinement of the NOP reporting tools, which builds upon the successful implementation of the Administrative Citation NOP. NERC is concurrently filing certain Notices of Penalty in a proposed new Spreadsheet NOP format as well as others as Full NOPs.

The oversight roles of Regional Entities, NERC and FERC are respected and reinforced in this initiative and ensure that Registered Entities remain accountable, in all cases, for compliance with NERC Reliability Standards. If the Commission has concerns with NERC's implementation of its FFT program, such concerns can be addressed promptly on a prospective basis in response to NERC's planned six-month and one-year reports on the FFT process.

## **II. NERC Is Refocusing Efforts On How Issues Are Resolved To Reduce Reliability Risks And Promote Reliability Excellence.**

Following the FERC-led Reliability Technical Conference in February 2011,<sup>1</sup> NERC and Regional Entities have substantially increased efforts to review their existing processes and procedures in order to determine if there are more efficient and effective ways to implement them. This filing sets forth new and improved compliance enforcement tools and mechanisms to meet reliability objectives, in accordance with existing FERC rules, regulations and orders. NERC is pleased to present them to the Commission and industry and looks forward to their successful implementation.

### **A. The Commission Has Repeatedly Recognized the Importance of Re-examining Processes and Procedures, Redirecting Efforts to Ensure Mission Success and Reducing Undue Regulatory Burdens.**

In developing this compliance enforcement initiative, NERC has carefully considered the individual and collective statements of the Commissioners in meetings, technical conferences, testimony and orders. Three FERC-led Technical Conferences conducted in 2010-2011 have focused on addressing issues related to development and enforcement of NERC Reliability Standards (July 6, 2010), exploring issues associated with reliability monitoring, enforcement and compliance (Nov. 18, 2010) and priorities for addressing risks to the reliability of the BPS (Feb. 8, 2011).<sup>2</sup> Commissioner Cheryl LaFleur said it well, “[a]s the old maxim goes, if everything is a priority, then nothing is a priority.”<sup>3</sup> In each of those meetings, NERC, Regional Entities and industry stakeholders expressed near-universal support for reevaluating, refocusing

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<sup>1</sup> Technical Conference on Priorities for Addressing Risks to the Reliability of the Bulk-Power System, Docket No. AD11-6-000 (Feb. 8, 2011).

<sup>2</sup> *Id.*; Technical Conference to Address Industry Perspectives on Certain Issues Pertaining to the Development and Enforcement of Mandatory Reliability Standards for the Bulk-Power System, Docket No. AD10-14-000 (July 6, 2010); and Technical Conference on Reliability Monitoring, Enforcement and Compliance Issues, AD11-1-000 (Nov. 18, 2010).

<sup>3</sup> Statement of Commissioner Cheryl A. LaFleur on NERC’s 3-Year Assessment, Docket Nos. RR09-7-000 and AD10-14-000 (Sept. 16, 2010).

and re-prioritizing reliability compliance enforcement efforts. This initiative is complementary to NERC's prioritization efforts that have been underway since 2010.

Chairman Jon Wellinghoff recently testified as to the ongoing need for, and appropriateness of, ensuring efficiency and effectiveness of processes and procedures:

The Commission regularly reviews its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers.<sup>4</sup>

With respect to reliability matters specifically, the Commission has recognized NERC's need and efforts to reevaluate and develop flexible approaches and more streamlined processes that result in differentiation of violations by risk:

The Commission recognizes that NERC and the Regional Entities expend substantial efforts and resources monitoring compliance with the Reliability Standards and building adequate records to support findings of violations for Commission review. On numerous occasions, the Commission has encouraged NERC and the Regional Entities to develop flexible approaches and more streamlined processes to achieve efficiency in the enforcement process, especially with regard to more minor violations. [footnote omitted]<sup>5</sup>

In approving the Administrative Citation NOP spreadsheet format earlier this year, the Commission recognized that it would be "a successful tool in improving efficiency of NERC's enforcement process, thereby reducing the time and resources expended by the Regional Entities, NERC, and the Commission staff while still achieving

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<sup>4</sup> Written Testimony of Chairman Jon Wellinghoff before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, July 7, 2011, at p. 2. Subsequently, on July 11, 2011, President Barack Obama issued an Executive Order to independent agencies, such as FERC, to develop and release a plan to review rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. President Barack Obama's Executive Order 13579, Regulation and Independent Regulatory Agencies at Section 2 (July 11, 2011). Chairman Jon Wellinghoff announced that same day that the Commission would implement President Barack Obama's Executive Order. FERC News Release, "FERC To Institute Public Review of Regulations" (July 11, 2011). While NERC is not subject to the Executive Order, NERC has been conducting a retrospective analysis of its rules, regulations, processes and procedures to determine what needs to be modified, streamlined, expanded or repealed that is consistent with the spirit of the Executive Order. This initiative is in response to that review.

<sup>5</sup> *North American Electric Reliability Corp.*, 134 FERC ¶ 61,157 at P 7 (2011).

transparency and consistency in penalty determinations.”<sup>6</sup> NERC agrees. The simple and streamlined spreadsheet helped significantly improve the end state processing and filing of issues. The instant effort effectuates implementation improvements commencing at the outset of the process.

**B. NERC is Redirecting Efforts to Ensure Mission Success in Reliability Excellence.**

**1. Significant Work Has Been Accomplished To Date.**

NERC’s refocusing efforts build upon the experience gained through, and successful implementation of, the CMEP to date and represent the natural progression of the program from a nascent state to a more mature level. Over 1,900 entities are responsible for compliance with over 100 mandatory and enforceable NERC Reliability Standards that contain 1,500 requirements. More than 12,500 compliance issues have been identified to date.

Nearly 5,100 of those issues were self-reported by Registered Entities pre-June 18, 2007, which was the effective date of the NERC Reliability Standards. There were incentives to industry to perform self-assessments to find issues, to report them to Regional Entities, NERC and FERC and to fix them prior to the effective date of the Reliability Standards. Entities that self-reported violations and corrected them or put in place mitigation plans to correct the issues were not subject to enforcement actions. There was appropriate oversight by Regional Entities and NERC and regulatory backstops if the corrective actions were not completed or ultimately were not successful. Of the pre-June 18 issues, over 2,100 issues were dismissed because they did not constitute violations. The remaining 3,000 issues that were self-reported have already been corrected, certified by Registered Entities as corrected and verified by Regional Entities as completed.

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<sup>6</sup> *Id.*

Over 7,500 issues were identified post-June 18, 2007. Of those, over 70% were self-identified by Registered Entities in Self-Reports, Self-Certifications, Exception Reports and Periodic Data Submittals. Approximately 1,750 issues were dismissed because they did not constitute violations or because they were duplicates of issues already in process. More than 2,500 violations have been filed in NOPs with FERC. FERC has reviewed only one NOP<sup>7</sup> on its own motion and has not overturned the ultimate disposition of any violations filed to date.

## **2. Significant Work Remains To Be Done.**

Currently, NERC and the Regional Entities have approximately 3,300 active issues in process. New issues are being reported to NERC and Regional Entities at a rate of approximately 200 per month. The intake process for all violations is largely the same, although great strides have been made in streamlining the processing of violations and filing documents in accordance with the seriousness of the violations. The intake process represents a significant time and resource commitment, and it essentially results in all violations being treated equally at least in the initial stages up to the end state filing stage. However, experience has shown that the vast majority of the issues processed to date pose a lesser risk to the reliability of the BPS. Continuing to process a large number of relatively minor violations in such a manner has the effect of diverting valuable resources of the industry, NERC and the Regional Entities from compliance efforts to address the more serious violations.

The current approach to compliance and enforcement processing is inconsistent with the prioritization efforts underway in other reliability areas such as standard development, audit practices and the final steps of the enforcement process. As discussed in greater detail below, this also is inconsistent with the way FERC and other agencies handle their respective caseloads.

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<sup>7</sup> *North American Electric Reliability Corporation*, 130 FERC ¶ 61,151 (Feb. 26, 2010). *See also North American Electric Reliability Corporation*, 134 FERC ¶ 61,209 (Mar. 17, 2011).

Rather than pursuing large numbers of small issues extensively, the credibility of NERC's CMEP will be enhanced by more efficient and effective processing of issues throughout the entirety of the process.

Under the current processing regime, NERC and the Regional Entities are processing issues at a rate of 176 per month, which includes dismissals and NOPs.<sup>8</sup> If left unchanged, it will take approximately 2 to 3 years or more to process the issues in the caseload from intake to final disposition either in a dismissal or a NOP.

### **3. Differentiating Issues Based On Risk Is Appropriate.**

The issues in the ERO caseload include the full spectrum of those posing a minimal to a serious and substantial risk to the reliability of the BPS. However, as noted above, experience has shown that the vast majority of the violations represent a minimal risk to the reliability of the BPS.

Since the inception of the ERO, the Commission's orders have recognized the need for, and importance of, prioritizing and devoting attention to the issues that present the greatest risk to reliability of the BPS.<sup>9</sup> FERC Orders issued over the last several years also recognize the continued need for, and importance of, streamlining and administrative efficiency in the processing and resolution of violations by focusing on serious violations and by allowing a scaled record development in relation to the nature of the violation.

In 2009, the Commission recognized that the record in a NOP should be proportional to the complexity and relative importance of the violations it addresses. It stated that a NOP need not include more information than necessary to support the rationale for the penalty, given the

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<sup>8</sup> This number is based upon the 112 average dispositions approved by the NERC Board of Trustees Compliance Committee ("BOTCC") over the last 6 months through June 30, plus 65 average dismissals over the last 6 months.

<sup>9</sup> *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 2006–2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,242 at P 222-225, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

nature of the violations at issue. The Commission expressed support for an abbreviated format for NOPs that conforms to the limited significance of particular types of violations, stating that this could provide transparency and predictability more quickly for certain categories of violations and allow Regional Entities and NERC to concentrate their compliance resources on more significant alleged violations.<sup>10</sup>

In 2010, in its Three-Year Performance Assessment Report Order, the Commission encouraged NERC and the Regional Entities to develop flexible approaches to align the record and format of notices of penalty to the relative significance of violations, such as *pro forma* settlements and proposals that could minimize the administrative burden of performing each step in the CMEP for every violation.<sup>11</sup> The Commission also invited NERC to continue to develop further streamlining efforts.<sup>12</sup>

According to Commissioner Moeller in recent testimony before Congress, “Ultimately, our intent is not to assess penalties, but instead, to increase compliance with our regulations.”<sup>13</sup> Commissioner John Norris has acknowledged the importance of lessons learned, “While addressing compliance and enforcement is necessary in a mandatory reliability standards regime, I am glad we are giving attention to the value of lessons learned as well.”<sup>14</sup> They correctly recognize the need to balance compliance, enforcement and educational tools to meet reliability objectives. The Commissioners’ individual and collective perspectives have helped to inform the review process and shape NERC’s initiative.

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<sup>10</sup> *Further Guidance Order on Filing of Reliability Notices of Penalty*, 129 FERC ¶ 61,069 at P 10 (2009).

<sup>11</sup> *North American Electric Reliability Corp.*, 132 FERC ¶ 61,217 at P 218 (2010).

<sup>12</sup> *Id.*

<sup>13</sup> Written Testimony of Commissioner Phillip D. Moeller before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, July 7, 2011, at pp. 4-5.

<sup>14</sup> Statement of Commissioner John R. Norris on Recent Inquiry into Outages in Texas and the Southwest, Docket No. AD11-9-000 (Feb. 17, 2011).

#### **4. Undue Regulatory Burdens Must Be Eliminated.**

In contrast to the sentiments reflected in the above referenced orders, application of formal and informal guidance has resulted in unintended and undue administrative, paperwork and regulatory burdens in the day-to-day execution of the CMEP. Such an approach, however, does not work to achieve excellence in reliability and does not amount to effective and efficient administration of the program. Some examples will illustrate:

- A small entity failed to have on file and available to its staff a record of the local FBI office to aid in reporting possible sabotage events, a violation of CIP-001 Requirement (R) 4. The resulting NOP and supporting material for this single issue violation was over 40 pages long and took 21.5 months to process from discovery to the filing of the NOP.
- The Omnibus I NOP was initiated to resolve a large number of relatively lesser risk issues discovered from June 2007 to July 2008. Because the violations occurred during the start-up phase of the CMEP, the records for the individual cases were not as well-developed as the records of later cases. NERC utilized a spreadsheet format to convey the available information. The filing ended up being over 20,000 pages long and required significant time and effort by NERC, Regional Entities and Registered Entities to compile and produce. NERC is informed that its Omnibus I filing set a new record for the length of an electronic filing at the Commission.
- From time to time, when NERC and a Regional Entity have proposed to dismiss or otherwise dispose of a Possible Violation in a NOP, they receive requests for evidence that the Registered Entity did not violate other standards or requirements. This is, in effect, a requirement that NERC and a Regional Entity prove the negative.

It is not necessary or wise to use the occasion for processing of one potential issue for exhaustive pursuit of every other potential issue. Where there are violations in process, NERC and Regional Entities should not be required to establish that other violations did not occur.

Indeed, as the Commission orders properly recognize, not every event on the system is a result of



a violation of a standard.<sup>15</sup> While there is the potential risk that some violations could go undiscovered and therefore not sanctioned, such risk is very small given that there are eight potential monitoring and discovery methods of issues, four of which are self-identification of issues by Registered Entities.

NERC rules and processes do not foreclose the possibility of further investigations by Regional Entities, NERC or FERC of issues when necessary. Importantly, NERC and Regional Entities do not make findings that an entity is “compliant.” Rather, they determine, based on evidence reviewed, whether there is an issue of noncompliance. Because each NOP resolves a particular set of violations, such notice does not foreclose processing of other issues separately that are identified in any of the eight compliance monitoring methods or that already may be pending before NERC and the Regional Entity.

The Administrative Citation NOP was expected to facilitate greater administrative efficiency in processing lower risk (minimal to moderate) issues. Ultimately, the possible candidate pool included only minimal risk issues and particularly those that related to very minor, administrative or documentation issues.

What was intended by NERC to be a relatively straightforward mechanism for disposing of issues that did not pose serious risks to BPS reliability did not come to fruition. This points to the need for, and importance of, avoiding arbitrary, preconceived limits that can be counterproductive and additional clarity and direction from the Commission to ensure that Possible Violations and resources are appropriately prioritized. The Commission can provide feedback on NERC’s implementation in response to monthly FFT submittals to help guide future

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<sup>15</sup> The Commission has recognized that loss of load may occur independently from a violation of a Reliability Standard. *North American Electric Reliability Corporation*, 134 FERC ¶ 61,209 at P 11 (2011) (citing *North American Electric Reliability Corporation*, 130 FERC ¶ 61,151 at P 1, 10-12 (2010)).

application. In addition, the Commission can provide feedback in response to the six month and one year reports to be submitted by NERC on implementation of the initiative.

It is important to remember that NERC, Regional Entities, industry stakeholders and FERC share the same goal, which is to ensure reliability of the BPS. As Commissioner Marc Spitzer properly has acknowledged:

The starting point for me on any discussion with the industry on reliability is to acknowledge that FERC and the regulated community have the same goal: to ensure the reliable operation of the Nation's transmission grid. I know the industry and NERC take their obligations seriously. I commend the industry and NERC for their hard work on these critical matters and I am committed to working with the industry and NERC to achieve our common goal.<sup>16</sup>

NERC, Regional Entities and industry stakeholders recognize the importance of attending, on a daily basis, to the details of planning and operating the most complex machine that humans have yet designed and built. The anatomy of major disturbances, such as the August 2003 blackout, reveals it is often a combination of relatively lesser mistakes and problems occurring simultaneously that precipitate a major disturbance. That is why it is important to identify and correct potential violations of Reliability Standards. However, it is not necessary that each of those corrected items must also be formally prosecuted as a violation and run through the full gamut of the CMEP. Indeed, as we have indicated, overzealous prosecution of lesser risk issues undermines the long-term effort to improve the reliability of the BPS.

Significantly, Registered Entities that have robust internal compliance programs are likely to find more issues to fix. Because their programs result in identification of a large numbers of small issues, they may view themselves as being penalized for coming forward as compared to their peers who may have mediocre or no programs that do not result in ongoing issue identification.

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<sup>16</sup> Statement of Commissioner Marc Spitzer on Priorities for Addressing Risks to the Reliability of the Bulk-Power System, Docket No. AD11-6-000 (Feb. 8, 2011).

The focus on finding and penalizing violations appears to be leading to an undesirable, increasing focus on control and management of compliance risk and penalty liability, rather than control and management of reliability risk. This philosophy is evident in some standard development projects in which the teams are considering proposals to limit the scope or applicability of a given standard or requirement which would thereby reduce potential compliance penalty risk. It is evident in the annual business plan and budget cycle each year, when calls are made by stakeholders for reductions in statutory activities, especially compliance and enforcement activities. It is evident in the context of the rising number of registration appeals and contested hearings. Considered separately and taken together, these issues clearly evidence a need to refocus the CMEP. By rebalancing the program, the emphasis can once again be on achieving reliability excellence.

There are many ways of approaching enforcement. The following example is illustrative, despite the fact that it deals with law enforcement, which is a different framework. A police officer may choose to pull a driver over for a burned out tail light. From the moment he approaches the car, he is assessing risk to himself and to the public. He will assess the risk based on his experience, his general understanding of the situation, as well as factors such as the time of day, location and the driver's dress, demeanor and responses to his requests. The police officer can run the driver's license and car tag to determine if there are issues not otherwise apparent in assessing the situation. If the initial check does not reveal an issue, the police officer, in disposing of the issue, has discretion to issue a warning ticket or a citation, along with directing the issue to be fixed. In either case, that could be the end of his review of the situation.

Certainly, if the initial check had not revealed any issues, it was within the discretion of the police officer to use the burned out tail light as an opportunity to conduct a broader review of the circumstances and investigate each and every possible thing related to the driver. Although he had the discretion, he would not likely have done so unless the specific circumstances of the case warranted.

### **III. NERC's Initiative Properly Refocuses the Compliance Enforcement Program.**

#### **A. What Has Been Done Up Until Today – Current Processing Of Possible Violations Has Not Permitted Significant Differentiation According To Risk.**

Until today, unless an issue warranted dismissal as discussed below, the ultimate disposition of every Possible Violation has been submitted in a Notice of Penalty. Four filing formats have been utilized most recently to differentiate the risk posed by a given issue.

Administrative Citation NOPs and Deficiency NOPs include minor, administrative or documentation issues to the Commission. The Administrative Citation NOP format, used for the last eight months, presents the relevant record information in a spreadsheet format and does not include supporting attachments, such as Settlement Agreements, Mitigation Plans, Registered Entity Certifications of Completion of Mitigation or Verifications by Regional Entities. Deficiency NOPs and Abbreviated NOPs, which resolve issues that pose minimal to moderate risks to the BPS, have included such supporting attachments and range in pages from ten pages to well over one hundred pages depending on the nature and number of issues. Full NOPs have typically been used to resolve issues that pose serious or substantial risks to the reliability of the BPS or to highlight corrective or other actions undertaken by Registered Entities to address issues. With the exception of the Administrative Citation NOP format, these NOP formats result in significant paperwork requirements.

The Commission's regulations, at 18 C.F.R. Part 39.7(b), require NERC and the Regional Entities to report all issues of potential noncompliance and their ultimate disposition. This initiative does not seek to change that requirement. Because everything must be reported to Regional Entities, NERC and FERC, prior to a substantive review, the Commission's orders properly recognize that some issues ultimately may be dismissed. Indeed, approximately twenty-five percent of all issues reported to Regional Entities, NERC and FERC are dismissed. Dismissals are communicated to FERC through a non-public portal.

As noted below, the Commission's orders recognize that NERC and Regional Entities have inherent enforcement discretion with respect to the ultimate disposition of issues. While NERC and Regional Entities have typically exercised that discretion in the application of penalties or sanctions, such discretion and available compliance and enforcement tools are actually much broader.

NOPs are one of many tools to convey important information to the industry. NERC and Regional Entities utilize Lessons Learned, Compliance Application Notices, Compliance Application Reports, Case Notes and other bulletins, reports and newsletters. Webinars, workshops and meetings hosted by NERC and Regional Entities also provide forums for discussions and dissemination of information. NERC and the Regional Entities are promoting the learning organization concept, and greater efforts are being devoted to educating the industry on expectations for compliance. NERC and Regional Entities are committed to ongoing outreach and educational opportunities.

Over the last four years, the industry stakeholders have greater experience in developing and implementing compliance programs to meet the standard requirements. The CMEP works in parallel with the compliance workshops and outreach programs hosted by NERC and the

Regional Entities. In addition, NERC and the Regional Entities are placing greater emphasis on industry participation in standard development, compliance monitoring activities and accountability for more significant violations.

**B. What Is Not Changing In Connection With The Proposal.**

Under this initiative, just as today, violations of NERC Reliability Standards are expected to be found. They must be corrected. The Registered Entity must submit to Regional Entities and NERC a statement of completion of mitigation activities undertaken to correct the issue and prevent recurrence. Such activities are subject to verification by the Regional Entity at an Audit, a Spot Check, random sampling or otherwise. The Remediated Issues will be included in, and taken into account as part of, the entity's compliance history. All issues, regardless of the ultimate disposition, must be reported to Regional Entities, NERC and FERC. In addition, penalties and other sanctions will continue to be determined based on the NERC Sanction Guidelines.

This initiative, therefore, does not effectuate a change in the fundamental tenets of the CMEP itself. As a result, it is being implemented in accordance with existing rules, regulations and orders.

**C. Overview Of The Initiative**

Going forward, NERC and Regional Entities will differentiate treatment for a given issue according to the risk posed to the reliability of the BPS. NERC and Regional Entities will utilize all available compliance and enforcement tools in dispositioning a given matter. NERC and Regional Entities also are refining the reporting mechanisms and filing formats to eliminate unnecessary paperwork burdens.

This filing walks through each step of the process and identifies where enhancements or adjustments are being made.

**1. Intake – Initial Receipt and Report of Possible Violations; Achieving Greater Uniformity Regarding Self-Reports**

At present, there are eight compliance monitoring methods by which potential non-compliance with a NERC Reliability Standard may be identified. These include: (1) Self-Reports; (2) Self-Certifications; (3) Exception Reporting; (4) Periodic Data Submittals; (5) Complaints; (6) Compliance Investigations; (7) Compliance Audits; and (8) Spot Checks.<sup>17</sup> This initiative does not effectuate changes to these monitoring methods.

Because seventy percent of all issues are self-identified by Registered Entities, NERC and Regional Entities believe it is important to provide greater clarity on the nature, scope and quality of the information Registered Entities should include in Self-Reports. NERC will be posting, on its website, a list of questions that Registered Entities should address in filling out a Self-Report that covers all aspects including the factual description of the issue, identification of the risk posed by the issue, a description of the actions taken or to be taken to correct and prevent future recurrence, identification of the evidence demonstrating such actions were taken (if completed), and requirements for a statement of completion (if completed). Registered Entities are expected to continue to utilize the self-reporting portal mechanisms already in place. Over time, NERC will evaluate whether and what changes to those reporting forms may be desirable.

On January 1, 2011, NERC's Preliminary Screen provisions in the Rules of Procedure became effective. Under Appendix 4C to the NERC Rules of Procedure, a Possible Violation is identified after the application, by the CEA, of a Preliminary Screen. The Preliminary Screen is defined as “[a]n initial evaluation of evidence indicating potential noncompliance with a

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<sup>17</sup> NERC Rules of Procedure, Appendix 4C CMEP at Sections 3.1-3.8.

Reliability Standard has occurred or is occurring, conducted by the [CEA] for the purpose of determining whether a Possible Violation exists, and consisting of an evaluation of whether (1) the entity allegedly involved in the potential noncompliance is registered, and (2) the Reliability Standard requirement to which the evidence of potential noncompliance relates is applicable to the entity and is enforceable.”<sup>18</sup>

Currently, within five days of intake of an issue of potential noncompliance, the Regional Entities verify that an entity is included on the NERC registry and is required to comply with the particular NERC Reliability Standard requirement.<sup>19</sup> Section 5.1 of the CMEP provides that if a Preliminary Screen results in an affirmative determination with respect to the above criteria, a Possible Violation exists and the CEA shall issue a Notice of Possible Violation to the Registered Entity. Upon issuing a Notice of Possible Violation, the CEA enters the Possible Violation into the NERC compliance reporting and tracking system. All Possible Violations are assigned a unique Regional Entity and NERC tracking number, which remains unchanged by this initiative. These are currently referred to as a Violation Identification Tracking Number and is unchanged by this initiative. Pursuant to 18 C.F.R. Part 39.7(b), “The Electric Reliability Organization and each Regional Entity shall have procedures to report promptly to the Commission any self-reported violation or investigation of a violation or an alleged violation of a Reliability Standard and its eventual disposition.” NERC reports the Possible Violation to the NERC BOTCC and submits a Notice of Possible Violation, on a confidential basis, to FERC.

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<sup>18</sup> NERC Rules of Procedure, Appendix 4C CMEP at Sections 1.122. *See also id.* at Section 5.1.

<sup>19</sup> There is a compliance filing pending at FERC, which is separate from the instant filing, that would require the Preliminary Screen to be applied within five business days of identification of potential noncompliance or obtaining evidence of noncompliance. *See North American Electric Reliability Corp.*, Compliance Filing, Docket No. RR10-11-000 at p. 22 (Feb. 18, 2011).



Regional Entities are required to keep a list of all issues that do not pass the Preliminary Screen and must provide it upon request to NERC and FERC. This initiative does not change that requirement.

The Notice of Possible Violation will be issued for every item regardless of whether it is ultimately included in an FFT, Full NOP or Spreadsheet NOP. With respect to items identified to be processed as an FFT, Registered Entities will be afforded an opportunity to opt out of the FFT process and to choose to proceed down the NOP path.

## **2. Treatment of Possible Violations – Selecting the Appropriate Enforcement Track for each Possible Violation According to Specified Criteria**

For those issues that do not warrant dismissal as discussed below, NERC and the Regional Entities will assess risk and differentiate Possible Violations in the initial stages of review as well as at the end of the process. This initiative will allow NERC and the Regional Entities to focus their time, efforts and resources on the issues that pose the greatest risks to reliability. Issues that pose more serious risks will continue to be included in NOPs. Lesser risk issues will be processed as Remediated Issues in a new FFT format described below.

Based upon an initial review of evidence indicating a Possible Violation, NERC and Regional Entities may exercise enforcement discretion to determine whether the issue should be dispositioned in a NOP or a new FFT report. Relying on their technical expertise, experience and judgment, they will: (1) evaluate the risk posed by the issue; (2) consider whether a penalty or sanction is warranted, taking into account the deterrence value of the mechanism chosen for the entity specifically and for third parties generally; and (3) determine if important information needs to be conveyed to industry stakeholders and/or FERC.

Factors taken into account during that initial review include, but are not limited to, the following: (1) the underlying facts and circumstances, including what happened, why, where and when; (2) the Reliability Standard at issue; (3) the applicable Violation Risk Factor (VRF) and Violation Severity Level (VSL); (4) the potential and actual level of risk to reliability, including mitigating factors during pendency of the Possible Violation; (5) the Registered Entity's compliance program, including preventive and corrective processes and procedures, internal controls and culture of compliance; and (6) the Registered Entity's compliance history.

Specific underlying facts and circumstances drive different results, even if two situations appear the same or similar on the surface. For example, the Registered Entity's size, nature of facilities and location on the grid are relevant in this review. The impact of the Possible Violation on third parties, including load, neighboring utilities, other Registered Entities must be considered. The time horizon (*i.e.*, real time, on or off peak or planning period) affects the risk posed by the Possible Violation. The specific act or omission and the likelihood of recurrence also are relevant.

The Reliability Standard at issue must be taken into account. However, in considering this initiative, NERC urges the Commission to decline to require or impose a list of Reliability Standard requirements that warrants issuance of a NOP.

VRFs and VSLs are not the deciding factor in a risk determination, but they do provide a starting point for review. For NOPs going forward, Regional Entities will consider whether a Medium to High VRF and a Moderate to Severe VSL are involved as part of the risk consideration and whether that resulted in a moderate to serious risk to the reliability of the BPS. Based on experience to date, there have been issues with High VRFs and Severe VSLs that had a

minimal risk to the reliability of the BPS. It is NERC's expectation that these would not necessarily warrant inclusion in a NOP, unless the facts and circumstances suggest otherwise.

A risk determination is multi-faceted. It requires consideration of the potential and actual risks to the reliability of the BPS, as well as factors that mitigate the risk during the pendency of the violation. In all events, risk assessments will continue to be made in accordance with the FERC-approved Sanction Guidelines. Over the last five years, there has been a marked increase in the rigor and quality of risk assessments, which has been facilitated by standardized compliance practices that are in use by NERC and the Regional Entities.

The following are examples of the most serious risk issues: (i) those involving or resulting in (a) extended outages, (b) loss of load, (c) cascading blackouts, (d) vegetation contacts and (e) systemic or significant performance failures; and (ii) those involving (a) intentional or willful acts or omissions, (b) gross negligence and (c) other misconduct. These have typically been included in Full NOPs to date. Other more serious risk issues have been included in abbreviated NOPs.

Lesser risk issues, defined as minimal and moderate risks, include administrative, documentation and certain maintenance or testing program implementation failures. These have typically been included in Deficiency NOPs, Administrative Citation NOPs and abbreviated NOPs.

An entity's compliance history, including prior or repeat issues by the entity or its affiliates, the entity's internal compliance program, internal controls and culture of compliance, are other factors that will be taken into account. NERC recognizes that a large number of Remediated Issues in an entity's compliance history could reflect an aggressive compliance

program or could be evidence of a systemic problem, depending on the underlying facts and circumstances. Accordingly, there is no one-size-fits-all formulaic approach.

The deterrence value and need for a penalty or sanction, based on the Regional Entity's examination of the matter, also will weigh in on whether a NOP is warranted. All cases involving a penalty or sanction will be included in a NOP.

Based on experience with the short-form settlement agreement and the Administrative Citation NOP candidates, NERC is not establishing rigid criteria as to other matters that should be included in a NOP. In the case of the short-form settlement agreement, significant time and effort was expended by Regional Entities, NERC and FERC staff. However, the list of eligible candidates turned out to be so limited that it resulted in no candidates. In the case of Administrative Citation NOP candidates, NERC staff's expectation was that the Administrative Citation NOP approach would provide administrative efficiency for the disposition of minimal to moderate risk issues. Ultimately, Administrative Citation NOPs contained only a subset of minimal risk issues which included only very minor, documentation or administrative issues. Thus, the Administrative Citation NOP never achieved the expected efficiencies or results in processing both minimal to moderate risk issues.

**a. Notices of Penalty**

As is the case today, NOPs will generally include issues posing a moderate to serious or substantial risk to reliability of the BPS, although there may be occasions where issues posing a minimal risk may also warrant NOP treatment.

Once a decision is made to include an issue in a NOP, there are two possible NOP formats: a new abbreviated, Spreadsheet NOP and a Full NOP. For all issues included in a NOP, NERC expects the documentation of the record to be commensurate with the risk. A sufficient

record may not require an exhaustive record where the issues are uncontested. This is consistent with prior Commission guidance:

the record in a Notice of Penalty should be proportional to the complexity and relative importance of the violations it addresses. **A Notice of Penalty need not include more information than necessary to support the rationale for the penalty**, given the nature of the violations at issue . . . an abbreviated format for Notices of Penalty that conforms to the limited significance of particular types of violations . . . could provide transparency and predictability more quickly for certain categories of violations and allow Regional Entities and NERC to concentrate their compliance resources on more significant alleged violations.<sup>20</sup>

Building on what was learned with the Administrative Citation NOP format, a new abbreviated, Spreadsheet NOP<sup>21</sup> has been developed. It includes: (1) The name of the entity; (2) Identification of each Reliability Standard violated; (3) A factual description of the issue resulting in the violation of each Reliability Standard; (4) A statement describing any penalty or sanction imposed; (5) The description of the risk assessment; (6) A statement of corrective actions taken or to be taken to mitigate the issue and prevent recurrence; and (7) Identification of any other mitigating or aggravating factors taken into consideration. The Spreadsheet NOP has been further expanded to ensure relevant prior compliance history of the entity or its affiliate and internal compliance program elements are included. As is the case with Administrative Citation NOPs, no record documents will be submitted as part of the filing. Relevant information regarding the findings and ultimate disposition will be included in the Spreadsheet NOP. NERC intends to post the Spreadsheet NOP on its Web site in a searchable format, which will provide greater transparency. The majority of NOP candidates are expected to be included in this format.

Second, Full NOPs will continue to be filed just as they are today. Full NOPs are generally expected to include violations that pose the most serious risk to the reliability of the BPS. The following issues are expected to be included in Full NOPs: (i) those involving or

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<sup>20</sup> *Guidance on Reliability Notices of Penalty*, 129 FERC ¶ 61,069 at 9-10 (2009) (emphasis added).

<sup>21</sup> These types of issues have typically been included in Abbreviated NOPs to date.

resulting in (a) extended outages, (b) loss of load, (c) cascading blackouts, (d) vegetation contacts and (e) systemic or significant performance failures; (ii) those involving (a) intentional or willful acts or omissions, (b) gross negligence and (c) other misconduct. However, Full NOPs may also be filed for an entity that has a large number of less serious issues as that could be indicative of a systemic issue.

Full NOPs need not have a negative connotation. They also may be used to provide detailed information regarding exemplary cooperation, a robust internal compliance program and above and beyond actions.

**b. Find, Fix, Track and Report (FFT)<sup>22</sup>**

A key feature of this implementation initiative is the new FFT spreadsheet approach for resolving lesser risk issues and reporting their disposition as Remediated Issues to FERC. The name says it all. Things are found, fixed, tracked and reported.

The FFT spreadsheet is adapted from the successful implementation of the Administrative Citation NOP format in use over the last eight months. The FFT approach is consistent with the spirit of the Three-Year Performance Assessment Report Order, in which the Commission invited NERC to continue to develop further streamlining efforts. Consistent with the guidance provided in that Order,<sup>23</sup> FFT treatment includes both a reporting requirement and inclusion of the FFT resolution in an entity's compliance history. Although the FFT approach does not adopt one of the elements identified in that Order – a statement by the Regional Entity and the Registered Entity as to whether or not a violation occurred<sup>24</sup> – that omission should not

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<sup>22</sup> By way of example, these could include, but are not limited to, issues that have been included in the Administrative Citation NOPs, Deficiency NOPs and zero and lower dollar minimal to moderate risk issues in the Abbreviated NOPs. In all events, risk assessments will be made in accordance with the FERC-approved Sanction Guidelines. For example, risk assessments will take into account size, location and characteristics of BPS facilities that are owned, operated or used by an entity.

<sup>23</sup> 132 FERC ¶ 61,217 at PP 218-219.

<sup>24</sup> *Id.* at P 219.

be considered a barrier to implementation of FFT because FFTs are considered Possible Violations that are resolved as Remediated Issues and because of FFT's other safeguards. Once Remediated Issues are included in an FFT informational filing, those Remediated Issues may not be contested in subsequent enforcement actions.

In particular, the strong remediation feature of FFT, with every issue resolved by mitigating actions *before* FFT treatment is reported to the Commission, more than makes up for omission of a further step to decide, definitely, that a violation has, or has not occurred. Going beyond the Possible Violation stage for lesser risk matters would cause more delay and controversy on issues that do not warrant expenditure of significant enforcement time and resources and is not required by NERC's rules.<sup>25</sup> In addition, the mitigating activities will be subject to verification and taken into consideration if future auditing efforts reveal continued concerns. As an added enhancement, the FFT approach not only tracks specific FFT issues and mitigation activities within each entity's compliance history, but also provides for systematic NERC tracking of region- and industry-wide trends in possible violations/issues to ensure continued reliable operations and compliance with standards, as well as consistency in implementation. Further, the experience of NERC and the Commission in the year since issuance of the Three-Year Performance Assessment Report Order has heightened the need to take a more flexible approach to enforcing compliance in a manner that truly fosters enhanced reliability rather than draining resources on minutia. Thus, the FFT approach provides the means to provide for prompt remediation of Possible Violations, accountability and tracking. It

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<sup>25</sup> See, e.g., NERC Rules of Procedure, Appendix 4C CMEP at Section 5.1 ("If the Compliance Enforcement Authority dismisses or disposes of a Possible Violation or Alleged Violation that does not become a Confirmed Violation, the Compliance Enforcement Authority shall issue a Notice of Completion of Enforcement Action to the Registered Entity.").

therefore avoids the pitfalls of a simple "warning ticket"<sup>26</sup> approach and furthers the intent of the Three-Year Performance Assessment Report Order.

Commissioner Moeller recently testified to the work done to date to streamline violation processing and the Commission's direction to NERC to continue to develop more efficient and effective ways to resolving lesser risk issues:

We have endeavored to create a more streamlined system of reviewing violations and **at our direction NERC is working to develop a more efficient way to address minor violations and to develop a "lessons learned/best practices" informational resource for regulated entities.** But clearly we have a lot of work ahead of us to reduce the backlog at the Regional Entities and at NERC in order to improve the effectiveness of this area of regulation.<sup>27</sup>

This initiative is the next step in the evolution of violation processing.

NERC and Regional Entities will conduct reviews and assess risks of FFT candidates, with appropriate rigor. For lesser risk issues, NERC and Regional Entities generally have sufficient information to make a determination after an initial review of the record without the need to develop an exhaustive record. The extent of the record will vary according to the specific Possible Violation. If an issue is discovered in an Audit, there may be Reliability Standard Audit Worksheets, draft and final Audit Reports and possibly Requests for Information. If an issue is self-reported, the record may include the submittal by the Registered Entity as well as additional information developed by the Regional Entity as necessary. Issues do not require

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<sup>26</sup> *Id.* at PP 218-219 ("At this time, we cannot accept the proposed development of a "warning ticket" that would not require a Regional Entity and a Registered Entity to state their conclusions about whether a violation has occurred. As we stated in the Omnibus Notice of Penalty Order, the Commission expects an increasing level of compliance with the Reliability Standards as Registered Entities gain more experience with mandatory Reliability Standards. This expectation emphasizes an important consideration for penalty determinations: a Registered Entity's compliance history. We are concerned that an improperly designed "warning ticket" mechanism may allow a Registered Entity to receive a warning for practices that violate a Reliability Standard requirement, thereby resulting in an insufficient recognition of a Registered Entity's compliance history in a subsequent penalty matter. If NERC still wants to pursue a "warning ticket" mechanism, it must explain how the mechanism would work without running afoul of the concerns raised above. NERC is free to provide that explanation in the informational filing or, if it chooses to take additional time to develop the mechanism, in a later filing.").

<sup>27</sup> Written Testimony of Commissioner Phillip D. Moeller before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, July 7, 2011, at p. 4 (emphasis added).



the same level of detail. A Registered Entity's failure to have the Federal Bureau of Investigation phone number should not require development of a treatise. The record could quite simply be a few sentences or a paragraph to describe the deficiency and corrective action. It also should not require tens or hundreds of man-hours to write it up. This does not mean, however, that NERC and Regional Entities will essentially "rubberstamp" a Registered Entity's own self-assessment without further review. To the contrary, NERC and Regional Entities will continue to make informed decisions, as they always have, taking into account the facts and circumstances and applying enforcement discretion, expertise and professional judgment.

Applying the factors discussed above, FFT candidates include Possible Violations that pose a lesser risk (minimal to moderate risk) to the reliability of the BPS. Each and every such lesser risk issue must be corrected and reported to Regional Entities, NERC and FERC. Upon correction and submittal of Registered Entity's statement of completion of mitigating activities, the lesser risk Possible Violations will become, and be referred to as, Remediated Issues. The Remediated Issue is included in, and considered a part of, the entity's compliance history, which could be positive or negative depending on the underlying situations. Remediated Issues will be included in FFT spreadsheet format provided monthly to FERC as an informational filing. The FFT spreadsheet template requires inclusion of a factual description of the underlying issue, a description of the mitigating activities and a description of the risk assessment. The submittal to FERC of the informational filing will conclude NERC and Regional Entity processing of Remediated Issues, subject to verification activities as warranted.

While an entity must correct the underlying Possible Violation and take actions to prevent recurrence, no penalty or sanction will be assigned to a Remediated Issue in a FFT. As a

result, NERC recognizes that the thirty-day clock applicable to NOPs does not apply to FFT informational filings.

Repeat issues of same, similar or different standards do not foreclose FFT treatment, but they could be taken into account in future actions. In the event a repeat issue is due to the fact that an entity failed to complete the required mitigating activities, NERC and the Regional Entities will assign a new tracking number to the issue, rather than reopening a former number. Regardless of the ultimate disposition format, the relevant information from the former record will be captured as background for the new matter.

Formal Mitigation Plans will not be required for the FFT Remediated Issues, but a Registered Entity must demonstrate that the issue has been addressed, corrective actions must be described and evidence must be delineated to facilitate later verifications through an Audit, Spot Check, random sampling or otherwise.

Issues identified in any one of the eight monitoring methods are possible FFT candidates. Determinations for FFT treatment may be made at any time and may be based on an initial review of the record information. Registered Entities and Regional Entities may provide a reasonable time period for the entity to gather facts and information and to determine appropriate mitigation activities.

As in the case of NOPs, no rigid criteria, parameters or guidelines are being established. Based on experience to date, there has been a high volume of lesser risk issues even with respect to top violated standards that would benefit from the FFT approach. As a result, violations of priority Reliability Standards and top violated Reliability Standards may qualify for this treatment, provided the risk assessment reveals the violation is a lesser risk issue. This is

appropriate because the number of violations does not necessarily implicate the severity of the risk. Moreover, some violations occur by even the most vigilant organizations.

VRFs and VSLs also will be taken into account in considering whether an issue warrants FFT treatment. Low to Medium VRFs, even if there are High or Severe VSLs, still qualify for consideration. Moreover, based on experience to date, there have been issues with High VRFs and Severe VSLs that had a minimal risk to the reliability of the BPS.

Other factors taken into account are whether there was prompt, robust self-reporting by a Registered Entity of the issue, risk and mitigating activities that demonstrates the issue has been fixed. In evaluating the promptness of reporting, NERC and Regional Entities will consider the time of discovery to the time of notification to the Regional Entity and/or NERC. Other factors that will be considered are the Registered Entity's internal compliance program, compliance history, mitigation and corrective action plans, internal controls and culture of compliance.

Depending on the facts and circumstances, prior compliance history could be indicative of a robust compliance program seeking out improvements or an indication of poor implementation of compliance efforts. Entities with the most robust internal programs may actually detect and report substantially more issues than entities that do not conduct similarly thorough internal reviews. NERC does not seek to discourage self-reporting. Toward this end, the existence of previous Self-Reports and violation findings associated therewith does not preclude the use of the FFT option.

Entities will be eligible for the FFT option even for repeat violations provided that they do not pose a more serious risk to reliability of the BPS. The identification of repeat issues of same, similar or different standards may lead the CEA to use its discretion to discontinue the use

of the FFT process and escalate the processing of these issues as Possible Violations as described in the CMEP.

**c. Dismissals**

This initiative does not change how dismissals are processed or reported to FERC. Dismissals of a Possible Violation occur at any time after the CEA determines the particular issue does not constitute a violation of a NERC Reliability Standard, the entity is not subject to compliance with the standard at issue or the particular issue is a duplicate of one already in process. Dismissals are, and will continue to be, submitted in reports to FERC via a non-public portal.

One enhancement to the existing program is that NERC will be publicly posting certain dismissal information on its website. NERC will update this information on a periodic basis. The first posting occurred on September 15, 2011 and is available at <http://www.nerc.com/files/Dismissal%20Analysis%209-15-11.pdf>.

**3. Monitoring of and Reporting on Mitigation Activities**

Whether an issue is included in an FFT or Spreadsheet NOP, mitigation activities must be recorded in the spreadsheet. The formal Mitigation Plan template and milestone reporting requirements will not be required for FFT. Nevertheless, it will be paramount that corrective actions be tracked to completion by the Registered Entity and will be subject to verification by the Regional Entity.

They will be assigned a Mitigation Identification Tracking Number. Mitigation activities included in FFT or Spreadsheet NOP submittals to FERC will be deemed as accepted by Regional Entities and approved by NERC at the time of filing.

NERC already has in place precedent where separate, formal Mitigation Plans and processing are not required. For example, both Administrative Citation NOPs and Settlement Agreements include a description of mitigation activities but they do not necessarily result in separate Mitigation Plans.

#### **Consequences for Failure to Complete FFT Mitigation Activities**

For any Remediated Issue that has been reported in an FFT and mitigation activities were not completed, the Regional Entity will not reopen the former Remediated Issue. Rather, the Regional Entity will record it as a new issue and will take the facts and circumstances into account in determining whether FFT or Spreadsheet NOP treatment is warranted.

#### **4. Mechanisms Exist To Ensure Consistency of Outcomes in Similar Situations**

With respect to consistency in outcomes, specific underlying facts and circumstances drive different results, even if two situations appear the same or similar on the surface. A Registered Entity's prior compliance history, culture of compliance, size, nature of facilities and location on the grid are among the considerations factored into an enforcement decision. NERC intends to post searchable spreadsheets for both FFTs and Spreadsheet NOPs that will help provide faster dissemination of information and more transparency in results. That format also will help NERC, Regional Entities and industry stakeholders identify potential consistency issues that need to be addressed. NERC cautions that consistent approaches do not equate to identical outcomes.

Utilization of common forms, letters and spreadsheets will help promote consistency in processing issues. Ongoing training and guidance also will further promote consistency in implementation. NERC and Regional Entities will pay particular attention to consistency in outcomes and due process and will realign as necessary.

**D. Outreach Efforts Have Been Instrumental In The Development Of The Initiative And Will Continue Through The Implementation.**

When the initiative was rolled out at the Vancouver Board meeting, the importance of outreach efforts was clearly recognized. NERC and Regional Entities have conducted outreach efforts to explain the initiative and obtain support. While NERC has developed the initiative in concert with the Regional Entities, it has encouraged input and feedback from all stakeholders. As the initiative was being developed, NERC hosted a Registered Entity focus group meeting to obtain first-hand information about current program implementation areas of improvement and success. Additional meetings and conference calls have been held with NERC, Regional Entities, trade associations and industry stakeholders. Trade associations and industry stakeholders also were provided an opportunity to provide written comments to NERC for consideration in finalization of the initiative. NERC and Regional Entities also separately and collectively met with Commission staff in advance of this filing. NERC values all of the input and will continue to solicit input and feedback on program implementation.

Specifically, monthly calls/meetings with Regional Entities, Compliance and Certification Committee representatives and trade associations will be held to gain feedback on the program. Ongoing ERO review of the initiative will occur over the next nine to twelve months to determine further areas of improvement or efficiency gains and to track success of the program. Another focus group meeting may be held to assess progress of the initiative. In addition, NERC is willing to engage in discussions with Commission staff about program implementation.

**E. Implementation of the Initiative.**

**1. Implementation Timing and Phases**

There are two projected phases for implementation.

In Phase I, CEA compliance staff may make recommendations to enforcement staff as to whether an issue warrants FFT, Full NOP or Spreadsheet NOP processing. CEA enforcement staff will continue to make determinations as to the ultimate disposition of an issue. Enhanced training of both enforcement and compliance staff will occur throughout Phase I. This ongoing training and guidance will address consistency in due process and implementation of the program across the Regions.

NERC and Regional Entities have existing, ongoing mechanisms to train staff on the initiative. In addition to regularly scheduled calls and meetings, other periodic meetings will be scheduled from time to time to align efforts. Scheduled workshops hosted by NERC and Regional Entities provide another opportunity to coordinate and collaborate on the successful implementation of the program.

As Phase I progresses, data and information will be gathered and analyzed to support Phase II. During Phase I, CEA field staff is also encouraged to identify potential candidates for the FFT while out conducting Compliance Audits, Spot Checks and Compliance Investigations.

Phase II is targeted to occur after twelve to eighteen months of the implementation of the initiative. In Phase II, CEA compliance staff and CEA enforcement staff both may determine the ultimate disposition track for processing an issue of noncompliance.

Phase II will involve CEA Compliance field staff, auditors and investigators making determinations, during Compliance Audits, Spot Checks and Compliance Investigations, as to the treatment categories. In Phase II CEA field staff will be authorized to make determinations without CEA Enforcement oversight. However, it is envisioned that there will be close and constant collaboration between enforcement and field staff throughout the development and initiation of the initiative. This field staff determination will not preclude determinations by

CEA Enforcement staff as to particular facts and circumstances for items the field staff passes to enforcement staff for NOP processing.

The Phase II transition will occur over a period of time and is targeted to be fully implemented within 12 to 18 months after initiation of Phase I. Data and information gathering and analysis as Phase I is implemented and matures in the enforcement realm will inform the refinement and execution of Phase II. In addition to development of a rigorous training and certification program, consideration of the CEA field staff and their areas of expertise is important.

This phase will be predicated on an increased training and certification/qualification program for CEA Compliance staff that will commence during Phase I for auditors and investigators in the field. The training and certification plan for CEA staff will be comprised of 2 pillars: 1) standardized audit and compliance monitoring practices and 2) in depth assessment of the FFT candidates deemed eligible for the discretion process to inform CEA field staff discretion. Certification in this context should not be confused with individual certification as a NERC system certified operator or certification as regards to the top three functions of Balancing Authority, Reliability Coordinator or Transmission operator but certification to exercise discretion.

Determinations regarding compliance issues made in the field will be based on guidance developed during Phase I and a significant body of knowledge regarding the candidates for FFT that have been validated. Coupled with thorough preparation for and conduct of the audit greater rigor and consistency will be achieved. Spot Checks and Compliance Investigations must also have an appropriate plan that considers risk and appropriately scopes the compliance monitoring



activity. The Compliance Audit, Spot Check or Compliance Investigation plan should be the first point of coordination between enforcement and field staff.

## **2. Enhancements in Audit and Compliance Monitoring Practices**

NERC also is taking other steps in conjunction with FFT to ensure consistency of application within and across regions, transparency to stakeholders and FERC, and more effective administration of the CMEP. The implementation of the initiative will coincide with the implementation of certain enhancements to the audit and compliance monitoring practices. Consistent use of audit practices, procedures and tools are paramount and will be core to the training program to ensure consistent application of the discretion guidance in the field.

The Rules of Procedure direct the ERO to “have a program to monitor the compliance enforcement program of each Regional Entity that has been delegated authority. The objective of this monitoring program shall be to ensure that the Regional Entity carries out its compliance enforcement program in accordance with these rules and the terms of the delegation agreement, and to ensure consistency and fairness of the Regional Entity’s compliance enforcement program. Oversight and monitoring by NERC shall be accomplished through an annual compliance enforcement program review, program audits, and regular evaluations of Regional Entity compliance enforcement program performance as described below.”<sup>28</sup> One such tool is the ERO Sampling Methodology<sup>29</sup> that provides for a clear statistically-proven method for determining sample size. The sampling methodology also provides for the appropriate qualitative assessment for ensuring a sample set is consistent with the intent of the program

Rigorous standardized audit and compliance monitoring practices that ensure quality assessments and assurance, reliability enhancement and risk mitigation are essential for CEA

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<sup>28</sup> See NERC Rules of Procedure at Section 402.1.

<sup>29</sup> [http://www.nerc.com/files/Sampling%20Methodology%20Guidelines%20and%20Criteria\\_08\\_01\\_2011.pdf](http://www.nerc.com/files/Sampling%20Methodology%20Guidelines%20and%20Criteria_08_01_2011.pdf)

field staff. Before conducting one of these compliance monitoring methods, the audit being the primary compliance tool, both Regional enforcement and field staff must first assess a Registered Entity's compliance program and internal controls linked to reliability performance in order to understand the risk posed by the entity and appropriately scale the scope to be applied in the compliance process. The assessment must also include a review of the entity's compliance history.

As part of the 2012 CMEP Implementation Plan, the ERO is developing an entity assessment that will be used for exactly this type consideration as to the posture of an entity and its potential risk. The risk of individual situations and Possible Violations should be considered in the broader context of the entity's posture over all. The five components of the entity assessment are: 1) a technical and risk profile of the entity, 2) considerations of reliability metrics where feasible and relevant, 3) review of the internal compliance program, 4) review of the entities compliance history and 5) an assessment by the Regional Entity that deals with the entity on a day to day basis.

This entity risk assessment will inform the analysis of individual situations and Possible Violations and can be used to modify compliance monitoring activities. Where an entity has a higher degree of risk, increased compliance monitoring may be in order either by frequency or level of effort. Increased Self Certifications and or Periodic Data Submittals could provide emphasis on particular standards to ensure an entity is monitoring standards that may be of concern. Should more serious concerns be identified an entity could be subject to increased Spot Checks or Audits with increased scope. Where an entities profile indicates a lesser overall risk there could be lesser compliance monitoring. This allows for greater flexibility for the Regional

Entities to deal with trends, issues and adapt compliance monitoring to support reliability efforts with focused efforts.

The review of the Registered Entity's internal compliance program and internal controls of Regional staff could also provide an assessment and make recommendations on how the Registered Entity could improve its controls and procedures, including the identification of material weaknesses in those controls and procedures. Neither NERC nor the Regional Entities will prescribe the makeup of internal compliance program, internal controls or processes. Registered Entities would have the responsibility to demonstrate the effectiveness of their compliance programs; and here, model program(s) established by the industry would be very helpful. Further an evaluation of the strength of the internal procedures and controls would be completed upfront to determine whether the procedures and controls are sufficient to proactively address possible violations and risk before they become more material or significant to reliability, an essential component to continuous improvement in a "learning" environment.

The ERO does not follow the Generally Accepted Government Accounting Standards (GAGAS) to the letter but does use GAGAS to inform its compliance monitoring activities. No compliance monitoring method can guarantee absolute compliance on the part of an entity. Compliance Audits, Spot Checks and Compliance Investigations can provide reasonable assurance of compliance. Consideration of risk and significance must be considered in the compliance monitoring activities. Risk on both the part of the entity and the compliance monitoring activity are to be considered in the planning of Compliance Audits, Spot Checks and Compliance Investigations.

Clearly issues that prove feasible to dispose of via the discretion option during Phase I will be the base of training and education to develop the appropriate level of judgment and

authority field staff will be allowed to exercise in Phase II. As noted above, issues that are identified, fixed and reported provide a base for consistent implementation and improvement. This will also provide for a level of openness and transparency as the ERO provides periodic reports to FERC and industry on the implementation of the program. The discretion that field staff exercises will at the outset be with constant communication with enforcement staff and as the discretion is more defined and validated in the field this will serve to allow enforcement staff more time to focus on higher risk issues that pose a threat to the reliability of the BPS.

CEA field staff, auditors and investigators are recruited based on industry and/or auditing experience; a significant number of the CEA auditors possess certifications such as NERC Certified System Operator, or are credentialed in the Information Technology (“IT”) or auditing fields. As such CEA staffs are expected to exercise judgment; fundamental auditing principles clearly state this along with the concept that individual expertise and professional qualifications are to be considered in compliance monitoring programs. A competent and judicious CEA field staff will be able to make discretion determinations made in the field allowing enforcement staff to focus on the critical issues impacting/affecting reliability that require their level of effort.

Registered Entities with strong internal compliance programs would experience less invasive oversight from the Regional Entities commensurate with an informed, assessment of risk. With higher rigor and more discretion, Regional Entities and NERC will have more flexibility to keep up with the ever changing threats and new technologies to mitigate risks to the system – we can be more responsive, less prescriptive and “mechanical.” Elimination of or modification to the annual implementation plan, coupled with the introduction of a level of randomness and the emphasis on internal compliance programs (cultural and procedural) would substantially reduce the number of Self-Certifications for those entities with top notch internal

compliance programs. “Annual Self-Certification programs” could be customized based on a variety of risk factors.

In summary, the proposed changes would acknowledge that compliance with standards is only part of maintaining reliability and the emphasis on System Reliability Management would provide the proper scope and context to NERC’s and the Regional Entities’ work.

#### **IV. There Is Ample Legal Authority for NERC to Exercise Enforcement Discretion.**

##### **A. The Commission Has Acknowledged NERC’s Enforcement Discretion.**

NERC and the Regional Entities are subject to Commission oversight. Nonetheless, the Commission has long-recognized that NERC and the Regional Entities are enforcement entities and have the same inherent enforcement discretion and authority as any other enforcement entity would have. In Order No. 693, the Commission stated that:

The Commission agrees that, separate from our specific directive that all concerned focus their resources on the most serious violations during an initial period, **the ERO and Regional Entities retain enforcement discretion as would any enforcement entity. Such discretion, in fact, already exists in the guidelines; as we stated in the ERO Certification Order, the Sanction Guidelines provide flexibility as to establishing the appropriate penalty within the range of applicable penalties.**<sup>30</sup>

In accepting the eight delegation agreements between NERC and the Regional Entities, the Commission explained that NERC’s CMEP and Rules of Procedure, including the Sanction Guidelines, equip NERC and the Regional Entities with the requisite tools to exercise their inherent enforcement discretion:

In Order No. 693, we determined that the ERO and Regional Entities will retain ongoing enforcement discretion as would any enforcement entity [citing Order No. 693, 118 FERC ¶ 61,218 at P 225]. **NERC and the Regional Entities should evaluate whether to issue a notice of alleged violation, find violations, and impose appropriate sanctions based on the facts presented, rather than**

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<sup>30</sup> *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 2006–2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,242 at P 225 (emphasis added), *order on reh’g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007), referencing *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (2006) at P 451(emphasis added).

**erect blanket exemptions from potential enforcement actions in advance of considering individual cases. NERC's Uniform Compliance Program will provide Regional Entities and NERC with sufficient tools to ascertain the relevant facts and to find, or decline to find, violations.** The NERC Sanction Guidelines, as we have modified them, allow for the informed discretion necessary for the Regional Entities and the ERO to apply appropriate remedies and sanctions for violations.<sup>31</sup>

The Commission also has made clear that it does not intend to review every NOP or even most. Rather, recognizing the Commission's own limited resources and the enforcement powers of NERC and the Regional Entities, the Commission determined it had no general need to review NOPs that have records developed by Regional Entities and reviewed by NERC for sufficiency and consistency.

We believe that entities that are subject to Reliability Standards should have notice of the general criteria the Commission will use to determine whether it will review particular notice of penalty on its own motion. We will use the following principles in this matter. First, the Commission does not anticipate moving to review every notice of penalty that NERC files, or even most. While the Commission is required to review every notice of penalty for which a Registered Entity files an application for review, the Commission's limited resources would likely preclude review of all uncontested notices of penalty. Second, as described earlier, the Commission has approved NERC's CMEP as the framework for NERC's enforcement authority under section 215 of the FPA, as well as NERC's delegation of enforcement powers to Regional Entities through the Delegation Agreements. The Commission sees no general need to review each notice of penalty for which a Regional Entity has developed a record and which it has approved, and which NERC has reviewed for sufficiency and consistency. **Third, the Commission recognizes that, on a continuing basis, Regional Entities and NERC retain an element of enforcement discretion similar to our own discretion in enforcement matters.**<sup>32</sup>

Significantly, the Commission's regulations, at 18 C.F.R. Part 39.7, require that NERC and Regional Entities file reports on the disposition of all violations. However, neither NERC nor Regional Entities are required, in every instance, to impose a penalty for violations. Where

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<sup>31</sup> *North American Electric Reliability Council et al.*, 119 FERC ¶ 61,060 at P 133, *order on reh'g* 120 FERC ¶ 61,260 (2007) (emphasis added).

<sup>32</sup> *Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 692*, 123 FERC ¶ 61,046 at P 10 (emphasis added), *citing Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 118 FERC ¶ 61,218 at P 225.

they seek to impose a penalty, they must meet certain conditions precedent. First, they must find a violation of an enforceable NERC Reliability Standard. Second, a NOP must be filed.

The Commission's regulations, at 18 C.F.R. Part 39.7(b), provide:

(b) The Electric Reliability Organization and each Regional Entity shall have procedures to report promptly to the Commission any self-reported violation or investigation of a violation or an alleged violation of a Reliability Standard and its eventual disposition.<sup>33</sup>

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(4) Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk-Power System violated a Reliability Standard or by a settlement or other negotiated disposition. The disposition of each violation or alleged violation that relates to a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be nonpublic unless the Commission directs otherwise.

They further state, at 18 C.F.R. Part 39.7(c):

(c) The Electric Reliability Organization, or a Regional Entity, **may impose**, subject to section 215(e) of the Federal Power Act, a penalty on a user, owner or operator of the Bulk-Power System for a violation of a Reliability Standard approved by the Commission if, after notice and opportunity for hearing:

(1) The Electric Reliability Organization or the Regional Entity finds that the user, owner or operator has violated a Reliability Standard approved by the Commission; and

(2) The Electric Reliability Organization files a notice of penalty and the record of its or a Regional Entity's proceeding with the Commission. Simultaneously with the filing of a notice of penalty with the Commission, the Electric Reliability Organization shall serve a copy of the notice of penalty on the entity that is the subject of the penalty.<sup>34</sup>

The Commission's regulations identify the required contents of a NOP, if filed, and establish the timing for Commission action. Any penalty imposed for the violation of a Reliability Standard must bear a reasonable relation to the seriousness of the violation and must take into

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<sup>33</sup> 18 C.F.R. Part 39.7(b).

<sup>34</sup> 18 C.F.R. Part 39.7(c) (emphasis added).

consideration efforts of such user, owner or operator of the BPS to remedy the violation in a timely manner.<sup>35</sup>

While NERC and Regional Entities have previously implemented their processes to submit every Possible Violation in a NOP, this is not required by a plain reading of the Energy Policy Act of 2005, the Federal Power Act, 18 C.F.R. Part 39.7 of the Commission's regulations or applicable Commission orders. Rather, the Commission's regulations, at 18 C.F.R. Section 39.7(d) set forth the basic requirements of what must be included in a NOP, if one is filed, which include:

- (1) The name of the entity on whom the penalty is imposed;
- (2) Identification of each Reliability Standard violated;
- (3) A statement setting forth findings of fact with respect to the act or practice resulting in the violation of each Reliability Standard;
- (4) A statement describing any penalty imposed;
- (5) The record of the proceeding;
- (6) Other matters the Electric Reliability Organization or the Regional Entity, as appropriate, may find relevant.

While a NOP must contain these basic elements, the Commission has not mandated the form or format of a NOP. The forms and formats utilized by NERC and the Regional Entities have evolved significantly over the last four years. The first NOPs included, as an attachment, every notice issued by a Regional Entity for a given matter. Over time, those attachments were eliminated as not being necessary to support the NOP. With the Omnibus filings I and II and the eight Administrative Citation NOPs, over one-third of all issues have been dispositioned in a

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<sup>35</sup> 18 C.F.R. Part 39.7(g).



spreadsheet format. The Administrative Citation NOPs do not include supporting material attachments or settlement agreements.

Notably, the Commission has accepted, without review, seven Administrative Citation NOP submittals. The eighth Administrative Citation NOP was filed on August 31, 2011. To date, the Commission has set only one NOP for review on its own motion. Significantly, the Commission has not rejected, modified or remanded any violation findings or penalties.

In the case of FFTs, NERC and Regional Entities are not finding or confirming violations beyond the Possible Violation state and are not assessing penalties or sanctions. This is different than a zero dollar penalty. Section 5.1 of the CMEP recognizes the ability of NERC and Regional Entities to dispose of a Possible Violation without it becoming a Confirmed Violation:

If the Compliance Enforcement Authority dismisses **or disposes of a Possible Violation or Alleged Violation that does not become a Confirmed Violation**, the Compliance Enforcement Authority shall issue a Notice of Completion of Enforcement Action to the Registered Entity.

The Commission's regulations, at 18 C.F.R. Part 39.7(b)(4), also recognize that there can be a settled disposition that is different from a settlement agreement or a notice of penalty:

Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk-Power System violated a Reliability Standard or by a settlement **or other negotiated disposition**.

As noted above, the NERC and Regional Entities can decline to find a violation.<sup>36</sup> In addition, the Commission approved Sanction Guidelines recognize the need for flexibility in the administration of the program:

However, absolute adherence to the compliance programs, to the exclusion of other options, may not be the most appropriate, efficient or desirable means by which to achieve the end goal in all circumstances, to all entities party to a violation.

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<sup>36</sup> *North American Electric Reliability Council et al.*, 119 FERC ¶ 61,060 at P 133, *order on reh'g* 120 FERC ¶ 61,260 (2007) (emphasis added).

To fully appreciate the nature and scope of enforcement discretion authority that NERC and Regional Entities have, it is instructive to see how the Commission has defined and applied enforcement discretion itself.

**B. The Commission’s Own Experience Provides Support For NERC’s Increased Exercise of Enforcement Discretion.**

The Commission explained the exercise of enforcement discretion in its 2010 Revised Policy Statement on Penalty Guidelines.<sup>37</sup> According to the Commission, enforcement discretion is the ability of FERC Enforcement staff to choose what to pursue and how to pursue it.<sup>38</sup> FERC Enforcement has broad prosecutorial discretionary powers. FERC Enforcement staff may decline to open an investigation and may dismiss a violation at any stage of an enforcement action:

The Commission clarifies the Penalty Guidelines will not affect Enforcement staff’s exercise of discretion to close investigations or self-reports without sanctions. **Staff will continue to close all investigations where no violation is found, and to close some investigations without sanctions for certain violations that are relatively minor in nature and that result in little or no potential or actual harm. Similarly, staff’s review of self-reports will continue to result in many instances where staff does not even open investigations, particularly for minor violations that do not cause harm and where preventive measures have been implemented to avoid reoccurrences.**<sup>39</sup>

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In response to EEI’s specific requests for clarification on this issue, we emphasize that **Enforcement staff has discretion to dismiss investigations and to recommend both downward and upward departures from the Penalty Guidelines’ penalty range.**<sup>40</sup>

The Commission has recognized the importance of not pursuing penalties for every type of violation and to focus on those issues that pose more serious risks:

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<sup>37</sup> *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010).

<sup>38</sup> *Id.* at PP 27, 89.

<sup>39</sup> *Id.* at P 27 (emphasis added).

<sup>40</sup> *Id.* at P 29 (emphasis added).

**We reiterate that we retain discretion under the Penalty Guidelines not to investigate and pursue penalties for every type of violation. Under the Penalty Guidelines, we will continue to investigate serious reliability violations, not minor violations involving documentation or administrative errors that do not result in harm or significant impact to reliability.** Therefore, we find it unnecessary to adopt a distinction, as [Midwest Independent Transmission System Operator Inc. ] requests, between serious Reliability Standard violations and inadvertent violations that do not have a serious impact on reliability.<sup>41</sup>

Enforcement discretion extends to reliability matters:

**This chapter applies to the penalties to be imposed on all organizations for violations of the statutes, rules, regulations, restrictions, conditions or orders overseen by the Federal Energy Regulatory Commission.**<sup>42</sup>

In making decisions to close matters without further action, Enforcement staff is afforded significant discretion. FERC Enforcement discretion may be exercised before an investigation has occurred and may be based on an initial review. FERC Enforcement has discretion not to investigate when initial review establishes that investigation is not warranted. Discretion to take no action exists even when a violation has occurred. FERC Enforcement discretion may be exercised without Commission prior approval.

Matters investigated by staff but closed without action fall into many categories. Some are allegations of a serious nature, such as market manipulation, but are investigations in which staff concludes no manipulation occurred. **In others, there is insufficient evidence to proceed, or ambiguity as to the requirement which was allegedly violated. Other investigations present issues where significant Commission goals or policies are not implicated and no demonstrable harm occurred.** In such investigations, staff frequently closes investigations after action by the company to remedy the violation and to take steps to assure future compliance.<sup>43</sup>

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**[The Commission's Office of Enforcement's Division of Investigations (DOI)] reviews each self-report to determine whether the matter is of sufficient gravity to open an investigation, or whether the matter may be**

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<sup>41</sup> *Id.* at P 89 (emphasis added).

<sup>42</sup> *Id.*, FERC Penalty Guidelines, Chapter 1, Part A, §1A1.1. at P 1 (emphasis added).

<sup>43</sup> *2007 Report on Enforcement*, Docket No. AD07-13-000 (Nov., 2007) at 23 (emphasis added).

**disposed of with correction and compliance. Often, DOI staff determines that the self-reported matter is a violation of a minor nature and does not warrant an investigation, such as where the company brings its conduct into compliance and/or voluntarily undertakes increased internal procedures, training, and oversight to prevent the reoccurrence of the misconduct. In these situations, staff resolves the self-report without considering civil penalties or monetary sanctions.**<sup>44</sup>

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**Ultimately, staff may determine that no violation occurred, or may conclude that the evidence is insufficient to warrant further investigation, or that based on all of the circumstances no further action is warranted. If so, staff notifies the company that the investigation is closed, and discusses with or otherwise advises the Commission of its decision.**<sup>45</sup>

In addition, with respect to self-reports, the Commission has explained the considerations it takes into account as to whether or not to proceed with or close the matter:

After receiving each self-report, staff **reviews the report to determine whether the matter is of sufficient gravity to warrant an investigation or whether the matter may be disposed of with correction and compliance.** Staff regularly considers whether (1) there is an explanation for the conduct; (2) the self-reported matter caused any harm; (3) corrective action has been taken; and (4) the company has adopted measures to prevent future violations. If the violation was inadvertent or isolated, did not cause harm, was corrected, and preventative measures have been taken, then the Enforcement staff closes the self-report without an investigation or sanctions.<sup>46</sup>

Other factors the Commission has identified in deciding how to resolve a matter or whether to initiate an investigation include:<sup>47</sup>

- Nature and seriousness of the alleged violation
- Nature and extent of the harm, if any
- Efforts made to remedy the violation
- Whether, if known, the alleged violations were widespread or isolated
- Whether, if known, the alleged violations were willful or inadvertent
- Importance of documenting and remedying the potential violation to advance Commission policy objectives
- Likelihood of the conduct reoccurring

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<sup>44</sup> *Id.* at 15 (emphasis added).

<sup>45</sup> *Id.* at 19 (emphasis added).

<sup>46</sup> *2008 Report on Enforcement*, Docket No. AD07-13-001 (Oct. 31, 2008) at 12 (emphasis added).

<sup>47</sup> *2007 Report on Enforcement*, Docket No. AD07-13-000 (Nov. 14, 2007) at 14.

- Amount of detail in the allegation or suspicion of wrongdoing
- Likelihood that staff could assemble a legally and factually sufficient case
- Compliance history of the alleged wrongdoer
- Staff resources

The applicable rules governing penalty determinations do not even come into play until after a decision has been made by Enforcement staff to process an issue of noncompliance as a violation and to pursue penalties or sanctions.

**[T]he Penalty Guidelines do not affect the Commission’s Office of Enforcement staff’s exercise of discretion to close investigations and self-reports without sanctions. These Penalty Guidelines apply only after staff has recommended, and the Commission determines, that a penalty is warranted and, even then, the Commission can depart from their application if appropriate.**<sup>48</sup>

FERC has provided guidance on when elimination of a civil penalty is appropriate.

**Thus, for complete elimination of a civil penalty, a company must affirmatively demonstrate (1) that its violation was not serious and (2) that its senior management has made a commitment to compliance, that the company adopted effective preventive measures, that when a violation is detected it is halted and reported to the Commission promptly, and that the company took appropriate remediation steps. All of the components must be present for complete elimination of a civil penalty; reduction of the penalty will be considered where the company meets some but not all of the requirements.** The Commission retains discretion to determine whether the actions taken by a company are sufficient to meet the requirements.<sup>49</sup>

Thus, the Commission affords significant deference to its Enforcement staff in decisions not to further pursue a matter. As set forth below, FERC Enforcement staff has exercised its prosecutorial discretion to dismiss, or to decide not to initiate an extensive investigation, even when a violation clearly exists.<sup>50</sup>

Commission oversight is exercised in those cases in which Enforcement staff pursues violations and associated penalties. The Commission retains authority to depart from

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<sup>48</sup> *Revised Policy Statement on Penalty Guidelines*, FERC Penalty Guidelines, Chapter 1, Part A, §1A1.1. at P 1 (emphasis added).

<sup>49</sup> *Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 26 (emphasis added).

<sup>50</sup> *See, e.g.*, 2007 Report on Enforcement, Docket No. AD07-13-000 (Nov. 14, 2007) at 23.

Enforcement staff recommendations and its own penalty guidelines with respect to penalty determinations.

NERC finds it instructional that the Commission itself has found it appropriate to close or decline to pursue a number of matters under its jurisdiction. As reported in the 2010 Report on Enforcement prepared by Commission staff, of the 93 Self-Reports received in FY2010, staff closed 54 of them after an initial review and without opening an investigation.<sup>51</sup> In FY2009, staff received 122 Self-Reports and closed 62 of them after an initial review, and one was closed without sanctions after conducting an investigation.<sup>52</sup> For comparison, in FY2008, staff received 68 Self-Reports. Staff closed 25 of them after an initial review, and three were closed without penalties after conducting an investigation.<sup>53</sup>

With respect to investigations closed in FY2010, in eight, or 50 percent of the investigations, staff found a violation, but the investigation was closed with no sanctions.<sup>54</sup> During FY2009, eight investigations, or 22 percent, were closed with a finding of a violation, but closed with no sanctions.<sup>55</sup> In FY2008, staff opened more investigations than it had in the previous year, 48 as compared to 35.<sup>56</sup> In addition, staff closed a total of 22 investigations during FY2008.<sup>57</sup> Of these 22 closed investigations, eight, or 36 percent, were closed with a finding of a violation, but without the Commission imposing any sanctions.<sup>58</sup> Seven investigations, or 32 percent, were closed

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<sup>51</sup> 2010 Report on Enforcement, Docket No. AD07-13-003 (Nov. 18, 2010) at 10.

<sup>52</sup> *Id.*

<sup>53</sup> *2009 Report on Enforcement*, Docket No. AD07-13-002 (Dec. 17, 2009) at 8; *2008 Report on Enforcement*, Docket No. AD07-13-001 (Oct. 31, 2008) at 12.

<sup>54</sup> 2010 Report on Enforcement, Docket No. AD07-13-003 (Nov. 18, 2010) at 16.

<sup>55</sup> *Id.*

<sup>56</sup> *2008 Report on Enforcement*, Docket No. AD07-13-001 (Oct. 31, 2008) at 17 (emphasis added).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

with staff finding there was not sufficient evidence of a violation.<sup>59</sup> Seven investigations, or 32 percent, were concluded through settlement.<sup>60</sup> By comparison, in 2007, staff closed eight investigations, or 27 percent, with a finding of a violation, but without the Commission imposing any sanctions.<sup>61</sup> Eight investigations, or 27 percent, were closed with staff finding there was not sufficient evidence of a violation.<sup>62</sup> Thirteen investigations, or 43 percent, were concluded through settlement.<sup>63</sup> As in FY2007, staff closed eight investigations in which it found violations but closed the investigation without pursuing enforcement action.<sup>64</sup>

In addition, it is informative that:

**As noted in the Staff Report, between 2005 and 2007, Enforcement staff closed approximately 75 percent of its investigations without any sanctions being imposed, even though Enforcement staff found a violation in about half of those closed investigations. Only the remaining one-quarter of the total investigations completed during the study period resulted in civil penalties. Additionally, more than half of the self-reports submitted to Enforcement staff were closed with no action. The information provided in the Staff Report demonstrates that Enforcement staff frequently exercises prosecutorial discretion to resolve minor infractions with voluntary compliance measures rather than with penalties.**<sup>65</sup>

Factors cited by FERC Enforcement as the basis for no action following an initial review or subsequent to an investigation and frequency of citation. Based on a review of the 2007 – 2010 Enforcement Reports, there is no set list of factors that are evaluated in an enforcement action and FERC often focuses on one or two of the below factors as the basis for no action.

Corrected the violation quickly	35
Isolated incident	2
No harm	36

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 17-18.

<sup>64</sup> *Id.* at 18.

<sup>65</sup> *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at P 9 (emphasis added).

No economic benefit	14
Inadvertent violation	9
Short violation duration	10
Not a serious violation	4
Not intentional violation	11
No senior management involvement	3
Prompt action to prevent future reoccurrence	18
Ambiguous rule	1
Human error	2
Scope of violation is narrow	15
Compliance program	5

As discussed below, NERC’s refocused implementation of its CMEP emulates FERC

Enforcement staff’s application of enforcement discretion.

**C. Other Agencies Similarly Exercise Enforcement Discretion.**

In evaluating NERC’s proposal, the Commission should be mindful that nearly all federal regulatory agencies, including FERC, exercise enforcement discretion in cases of minor issues or where the regulated entity agrees to remediate noncompliance without penalty. Treating all instances of noncompliance with regulations in the same manner is not a source of strength for an agency’s enforcement program. Not exercising enforcement discretion dissipates the effectiveness of compliance and enforcement programs by overburdening the resources of the enforcement body and the regulated entities. Thus, less emphasis can be placed on avoiding instances of noncompliance with the regulatory requirements intended to prevent conduct that has the most harmful impacts under any particular regulatory scheme. Under federal judicial precedent, federal agencies are given wide latitude to decide where its investigative and prosecutorial resources are best applied. *Fleszar v. U.S. Dept. of Labor*, 598 F.3d 912 (C.A. 7 2010).

The enforcement policies of the Nuclear Regulatory Commission and Environmental Protection Agency illustrate “formalized” enforcement discretion processes.



## **1. Nuclear Regulatory Commission (NRC)**

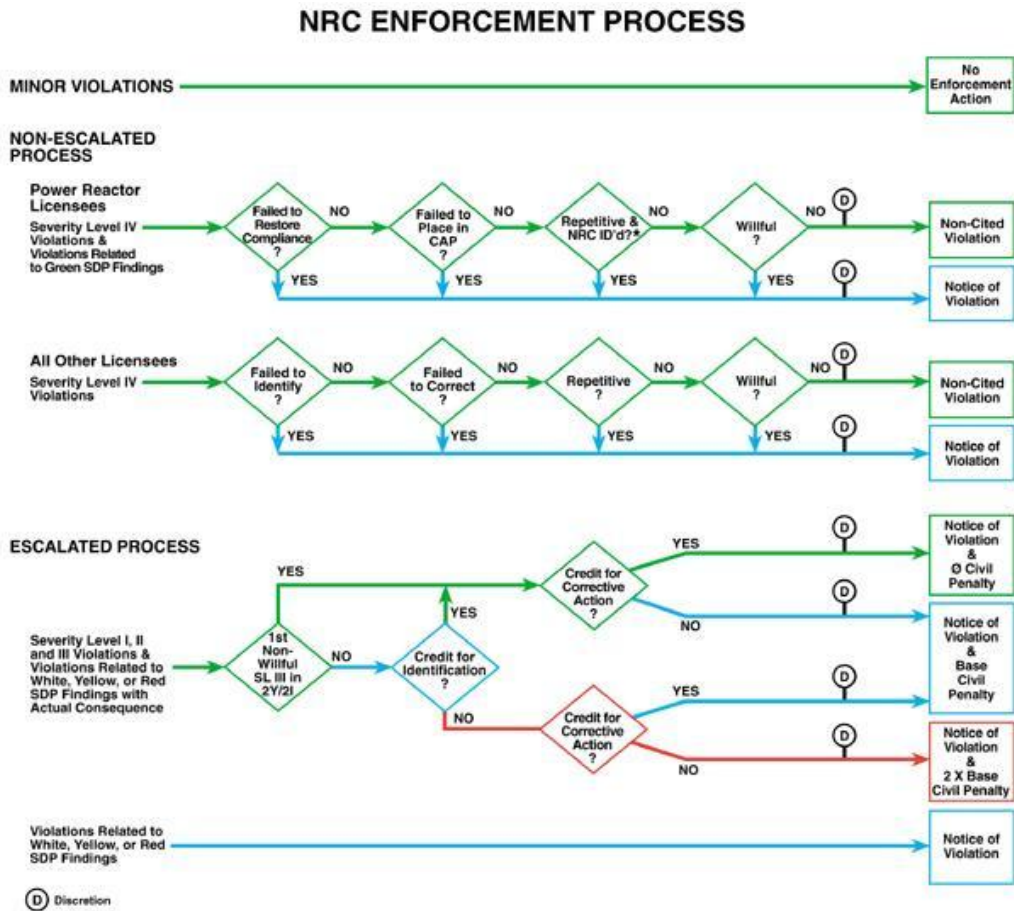
Recognizing that the regulation of nuclear activities does not lend itself to mechanistic treatment, the NRC exercises judgment and discretion in determining the severity levels of violations and the appropriate enforcement sanctions applied to violations. Since some of its regulatory requirements have a bigger impact on nuclear plant safety than others, the NRC strives to use a risk-informed approach when applying NRC resources to the oversight of licensed activities, including enforcement activities. Indeed, the NRC has authority to permit the continued operation of licensed nuclear units – despite the existence of a noncompliance – where the noncompliance is not significant from a risk perspective and does not, in the particular circumstance pose an undue risk to public health and safety.<sup>66</sup>

The NRC applies a “layered” approach to the disposition of violations depending on the level of risk involved. Minor violations generally do not warrant documentation in inspection reports, but they must be corrected. The NRC typically disposes of the next level of low risk violations through noncited violations (NCVs). An NCV disposition would require minimal documentation of inspection (audit) reports and brief descriptions of corrective actions. A violation above the lowest levels of risk are disposed by issuance of a Notice of Violation (NOV), which has a disposition process akin to the NERC CMEP NOV procedures. A civil penalty may be issued in conjunction with an NOV.

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<sup>66</sup> *NRC Enforcement Policy*, Nuclear Regulatory Commission, (July 12, 2011) at p. 6. *See also id.* at Section 3.0 Use of Enforcement Discretion. This document can be found at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>. *See also* <http://pbadupws.nrc.gov/docs/ML0934/ML093480037.pdf>.

The following chart illustrates the structure of the NRC enforcement process:<sup>67</sup>



## 2. Environmental Protection Agency (EPA)<sup>68</sup>

EPA enforcement programs incorporate enforcement discretion features to “triage” resources so that the most significant violations are acted on. The following are examples of how EPA enforcement programs provide for the exercise of enforcement discretion:

### a. Civil Enforcement Policy Under the Resource Conservation and Recovery Act (RCRA)

EPA’s Hazardous Waste Civil Enforcement Response Policy (ERP)<sup>69</sup> provides a general framework for classifying violations and violators of concern and describes timely and

<sup>67</sup> <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pro.html>.

<sup>68</sup> All of the EPA enforcement policy documents described below are available at <http://cfpub.epa.gov/compliance/resources/policies/civil/erp/>

appropriate enforcement responses to RCRA noncompliance. The ERP also establishes the priorities for compliance monitoring and enforcement activities. This is accomplished by establishing a comprehensive monitoring and inspection program, and addressing the most serious violators with timely, visible and effective enforcement actions. The EPA establishes enforcement Response Time Guidelines for the activities subject to its jurisdiction to ensure that more serious violations are dealt with expeditiously.

RCRA violators are classified into two categories: Significant Non-Compliers (SNCs) and Secondary Violators (SVs). SNCs are violators that have caused actual exposure or substantial likelihood of exposure to hazardous waste or hazardous waste constitutes; are chronic or recalcitrant violators; or deviate substantially from permit, statutory, or regulatory requirements. SNCs generally are subject to the full EPA civil enforcement process.

SVs are violators which do not meet the criteria for SNCs and pose no actual threat or a low potential threat of exposure to hazardous waste. The nature of SV violations are de minimis such that a prompt return to compliance with applicable rules is likely. Thus, the full EPA civil enforcement process is not followed. Often issuance of a warning letter with subsequent EPA follow-up without penalty is all that is involved.

In marginal cases of significant noncompliance, EPA may consider any steps the violator has taken to expeditiously come into compliance prior to discovery by the government and to mitigate any risks resulting from its violation. In some circumstances, the deviation from the requirements may not be considered substantial if the violator, on its own initiative, identifies the violation soon after the violation begins, takes steps to resolve the violation as expeditiously as possible, and mitigates any potential harm to the environment or the regulatory program.

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<sup>69</sup> *Hazardous Waste Civil Enforcement Response Policy*, Environmental Protection Agency (December 2003).

**b. Clean Air Act (CAA) Enforcement Response Policy**

EPA's CAA ERP follows established guidelines for timely and appropriate action. An appropriate enforcement response may include non-penalty actions (warning letter, finding of violation or preliminary determination), penalty actions (civil administrative action, civil judicial referrals) and criminal sanctions.<sup>70</sup>

The EPA may issue a warning letter in the event that problems are found with CAA source. No penalties are attached to a warning letter. Warning letters may be an appropriate response for easily correctable deficiencies which do not warrant further action. In the event that a source does not address the deficiencies noted in a warning letter, EPA will generally pursue an elevated enforcement response.

The EPA may issue a finding of violation (FOV) when any CAA violation is found. FOVs are an appropriate response to violations of a more significant nature but which do not rise to the level of a penalty action.

A preliminary determination is issued as a result of an audit conducted under EPA regulations. The determination consists of a written notice detailing any deviations from statutory or regulatory requirements, describing deficiencies in a source and an explanation for the basis of the findings, reflecting, if applicable, industry standards and guidelines. Failure to address the deficiencies in a preliminary determination will result in a penalty action by EPA.

An administrative order (AO) is a formal action ordering compliance with the CAA. As with an FOV, an AO cites the relevant statutory or regulatory requirements not being met. Similarly, failure to address the deficiencies identified in an AO will also result in a penalty action.

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<sup>70</sup> *Combined Enforcement Policy for CAA Section 112(r) Risk Management Program*, Environmental Protection Agency, August 15, 2001.

Issuing only a warning letter, preliminary determination, FOV, or AO is the appropriate enforcement response for easily correctable violations. For significant violations of the CAA, the EPA has a Policy on Timely and Appropriate Enforcement Response to High Priority Violations.

Thus, it is clear that other agencies also exercise enforcement discretion and judgment in the administration of their compliance and enforcement programs. While they monitor risks in their respective industries, they devote their time, attention and resources on those that pose the greatest risks. This approach is what NERC is seeking to emulate in its new initiative.

## **V. Request For Action**

NERC believes that this filing is fully consistent with NERC's existing rules and authority and the Commission's rules, orders and regulations; however, to the extent the Commission believes otherwise, NERC requests waiver of such rules, regulations and orders to put this new initiative and associated reporting tools in place starting now. Specifically, NERC requests that the Commission notice this filing for public comment and issue an order approving the compliance enforcement initiative and mechanisms described herein and providing any additional guidance that the Commission believes is appropriate. Additionally, NERC is submitting its first informational filing of Remediated Issues as an attachment to this filing. NERC is not requesting Commission action on the FFT informational filing.

NERC is concurrently filing NOPs in the new Spreadsheet NOP format as well as others as Full NOPs. It is NERC's expectation that the Commission will process all of those NOPs in accordance with the Commission's regulations set forth in 18 C.F.R. Part 39.7. While NERC describes the new Spreadsheet NOP format herein, NERC requests that the Commission take

action on the Spreadsheet NOP format and specific Spreadsheet NOP violations in the NP11-270-000 docket, rather than this docket.

NERC commits to report back to the Commission and industry stakeholders at six months and one year following this initial filing on experience gained and the results from implementation of the new mechanisms and tools.

**A. Commission Approval Of Compliance Enforcement Initiative And Associated Reporting Tools Is Appropriate.**

The Commission has repeatedly and properly recognized that NERC is an enforcement organization and has many compliance and enforcement tools at its disposal. Inherent in NERC's enforcement discretion is the ability to choose what to pursue and how to pursue it. While the Commission has an oversight role, it has made clear that it will not generally conduct reviews of uncontested matters or records developed by Regional Entities that were reviewed by NERC for sufficiency and consistency.

After four years of operation as the ERO, NERC has reassessed its existing policies and procedures to ascertain areas of improvement and identify undue administrative, regulatory or paperwork burdens. Based on this review, NERC has determined that implementation improvements can be made within the confines of existing rules, orders and regulations to ensure efforts are effective and efficient. The Commission has repeatedly recognized the importance of prioritizing issues and focusing on those issues that pose a more serious risk to the reliability of the BPS. This initiative achieves those goals. By identifying, mitigating and resolving issues that do not pose a serious or substantial risk to the reliability of the BPS on a more streamlined basis, more resources can be focused on violations that pose a greater risk to the reliability of the BPS.

The Commission has consistently endorsed and encouraged NERC's ongoing efforts to develop and utilize streamlined reporting mechanisms, such as use of spreadsheet formats for the submittal of NOPs. Most recently, the Commission commended the use of Administrative Citation NOP as "a successful tool in improving efficiency of NERC's enforcement process, thereby reducing the time and resources expended by the Regional Entities, NERC, and the Commission staff while still achieving transparency and consistency in penalty determinations."<sup>71</sup> Both the FFT and NOP formats build upon the Administrative Citation NOP format. For NOPs, the spreadsheet format has been expanded to ensure requisite record information is provided.

By making disposition decisions based on an initial review as warranted, tailoring and alignment of records to the seriousness of an issue and utilizing further streamlined reporting mechanisms, NERC and Regional Entities to eliminate undue administrative, paperwork and regulatory burdens and to continue to encourage self-reporting and corrective actions from Registered Entities.

NERC's initiative makes clear that all risks to reliability are expected to be found, fixed, tracked and reported, thereby ensuring that Regional Entities, NERC and FERC have situational awareness. Registered Entities are certainly encouraged by this effort to continue to self-identify their noncompliance with Reliability Standards. Where Registered Entities cannot or do not identify the issues, Regional Entities and NERC will continue to do so.

**B. Commission Acceptance Of The FFT Reporting Format Is Appropriate.**

The FFT informational filing is closure of the enforcement action by Regional Entities and NERC of certain Possible Violations that pose a lesser risk (minimal to moderate risk) to the

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<sup>71</sup> *Id.*

reliability of the BPS. NERC recognizes that the thirty-day clock applicable to NOPs does not apply to FFT informational filings.

While the FFTs will be reported to FERC for informational purposes, they are not submitted as a Notice of Penalty, subject to Commission review pursuant to FPA Section 215(e)(1) and 18 C.F.R. Parts 39.7(c) and (d). Pursuant to 18 C.F.R. 39.7(b), an issue addressed through the FFT process would continue to be promptly reported to FERC in a non-public Notice of Possible Violation (*e.g.*, soon after it is self-reported), with the “eventual disposition” reported through the public FFT informational filing.<sup>72</sup> FFTs would not be submitted to FERC as a Notice of Penalty because they do not satisfy the statutory and regulatory prerequisites for treatment as a NOP.

In the case of FFTs, NERC is neither finding a violation nor imposing a penalty, as required by 18 C.F.R. 39.7(c). NERC does not believe NOP filings are required by statute or regulation, or are appropriate where, as in the FFT context, there is no finding of a violation. For these reasons, it is fully consistent with FPA Section 215 and the Commission’s regulations for FFTs to be submitted only informationally, without submission as a NOP and without triggering the 30-day Commission review process under 18 C.F.R. Part 39.7(e).

If the Commission has concerns with NERC’s implementation of its FFT program, such concerns can be addressed promptly on a prospective basis in response to NERC’s planned six-month and one-year reports on the FFT process, or otherwise.

While NERC is not seeking approval of the FFT candidates in the submittal, NERC believes that Commission acceptance of the reporting tool is appropriate and would provide

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<sup>72</sup> As described below, the identity of the Registered Entity will be submitted to the Commission but will not be publicly disclosed in the informational filing.



certainty to the industry, Regional Entities, NERC and Commission staff as to the disposition of the Remediated Issues and the value of the tool.

Because the Commission's regulations do not appear to permit public disclosure of confidential information that is not included in a NOP, NERC is submitting public and non-public versions of the FFT spreadsheet. The name of the Registered Entity and identifying information is being withheld from the public version. NERC recognizes that the Commission may, on its own accord, authorize the release of the entities' names subject to applicable regulations and orders.

Therefore, information in and certain attachments to the instant filing include privileged and confidential information as defined by the Commission's regulations at 18 C.F.R. Part 388 and orders, as well as NERC Rules of Procedure including the NERC Appendix 4C CMEP. Specifically, this includes non-public information related to certain Reliability Standard violations, certain Regional Entity investigative files, Registered Entity sensitive business and confidential information exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should be withheld from public disclosure. In accordance with the Commission's Rules of Practice and Procedure, 18 C.F.R. Part 388.112, a non-public version of the information redacted from the public filing is being provided under separate cover. In addition, a copy of this filing is being provided to each Registered Entity involved in a Remediated Issue included in the FFT.

**C. Commission Acceptance Of September 30, 2011 Spreadsheet NOP Format Is Appropriate.**

NERC has concurrently submitted certain NOPs for Possible Violations that pose more serious risks to the reliability of the BPS, in the new Spreadsheet NOP format announced above. The Administrative Citation NOP's simple and streamlined

spreadsheet has been expanded to ensure the requisite level of detail and information is provided with respect to more serious risk issues so an informed decision on the merits can be made. As in the case of the Administrative Citation NOP,<sup>73</sup> no supporting material or attachments will be submitted to eliminate duplicative or unnecessary voluminous information. NERC respectfully requests that the Commission approve the use of this new tool as a means to report final disposition of certain serious risk issues, in accordance with 18 C.F.R Part 39.7 and applicable orders. The most serious risk issues will continue to be included in the Full NOP format in use today.

Notably, NERC has submitted approximately one-third of all violations in spreadsheet formats. These filings include Omnibus I and II<sup>74</sup> and eight Administrative Citation NOPs that were filed in 2011.<sup>75</sup> Utilization of the Administrative Citation NOP, Deficiency NOP, Abbreviated NOP and Full NOP formats helped to segregate and highlight issues based on the risk posed at the processing end state. The use of Disposition Documents and other standardized forms helped industry stakeholders, Regional Entities and NERC focus on information needed to dispose of an issue in a NOP.

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<sup>73</sup> The last Administrative Citation NOP filing was made on August 31, 2011.

<sup>74</sup> See *North American Electric Reliability Corporation*, Docket Nos. NP10-2-000 (Oct. 14, 2009) and NP10-160-000 (Sept. 13, 2010).

<sup>75</sup> See *North American Electric Reliability Corporation*, Docket Nos. NP11-104-000; NP11-133-000; NP11-162-000; NP11-181-000; NP11-199-000; NP11-228-000; NP11-253-000; and NP11-266-000.

## Conclusion

For the foregoing reasons, NERC respectfully requests that the Commission grant the requests for action set forth herein.

Gerald W. Cauley  
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Respectfully submitted,

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## Attachment 1

### **SUMMARY DESCRIPTION OF THE FFT**

#### **1. Find, Fix, Track and Report (FFT):<sup>76</sup>**

##### **A. FFT treatment occurs when:**

- 1) The Possible Violation poses a lesser risk (minimal to moderate risk) to BPS reliability.
  - a) Priority reliability standards/top violated standards may qualify for this treatment taking into account the particular facts and circumstances.
    - i. There has been a high volume of lesser risk violations even with respect to top violated standards that would benefit from the FFT approach.
    - ii. Some violations occur by even the most vigilant organizations.
    - iii. Some violations do not implicate the severity of the risk
    - iv. Specific facts must be considered to ascertain the significance of the issue with respect to actual/potential risk and/or harm to reliability of the BPS.
  - b) VRF/VSL
    - i. This will apply to Possible Violations of Lower to Medium VRFs even if the VSLs are High or Severe.
    - ii. Based on experience to date, there have been issues with High VRFs and Severe VSLs that had a minimal risk to the reliability of the BPS.
  - c) Risk Assessment that indicates the Possible Violation is not a serious risk to BPS reliability.
  - d) Prompt, robust self-reporting by a Registered Entity of the violation, risk and mitigating activities that demonstrates the violation has been.
    - i. NERC will evaluate the time discovered to the time reported.

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<sup>76</sup> By way of example, these could include, but are not limited to, Possible Violations that have been included in the Administrative Citation NOPs, Deficiency NOPs and zero and lower dollar minimal to moderate risk Possible Violations in the Abbreviated NOPs. In all events, risk assessments will be made in accordance with the FERC-approved Sanction Guidelines. For example, risk assessments will take into account size, location and characteristics of BPS facilities that are owned, operated or used by an entity.

1. This does not exclude from eligibility violations discovered in quarterly or annual reviews or mock audits encompassed in some entities' programs.
  2. NERC urges Registered Entities to notify Regional Entities right away upon discovery.
  3. Registered Entities and Regional Entities can then allot a reasonable time period for the entity to gather facts and information and to determine appropriate mitigation activities.
- e) Registered Entity Compliance program, mitigation and corrective action programs, internal controls and culture of compliance
- f) Entity Compliance History
- i. Depending on the facts and circumstances, prior compliance history could be indicative of a robust compliance program seeking out improvements or an indication of poor implementation of compliance efforts.
    1. Entities with the most robust internal programs may actually detect and report substantially more Possible Violations than entities that do not conduct similarly thorough internal reviews. NERC does not seek to discourage self-reporting.
  - ii. The existence of previous self-reports and violation findings associated therewith does not preclude the use of the FFT option.
  - iii. Companies will be eligible for the FFT option even for repeat violations that do not pose high risks to BPS reliability.
- g) Entity Event History
- i. The FFT option remains available to entities that demonstrate a culture of compliance.
- h) The specific facts associated with the potential issue, in combination with 2.A.1.a through 2.A.1.g, result in a determination by the Region that the issue poses a lesser risk (minimal to moderate risk) to BPS reliability.
- 2) The documentation and administrative requirements are commensurate with the risk posed by the issue and the CEA determines that there is sufficient information to conclude that further processing is not warranted.
- a) NERC envisions only a limited record, which would include only that information needed to fill out the spreadsheet. This will avoid

substituting one paperwork, resource and time intensive process for another with respect to lesser risk Possible Violations.

- b) Ongoing training and guidance will be in place to address consistency in due process across the Regions.
- 3) The Possible Violation is fixed.
  - a) At the outset, the issue will be included in the FFT only if it is fixed and the Registered Entity has provided a statement of completion to the Regional Entity that describes the issue addressed, the actions taken to mitigate and prevent recurrence and the risk to reliability.
  - b) Verification by the Regional Entity need not occur prior to inclusion in an FFT submittal to FERC. Regional Entities may verify completion at an Audit, Spot Check, random sampling or otherwise.
  - c) For any issue that has been reported in an FFT and mitigation activities were not completed, the Regional Entity will not reopen the former issue. Rather, the Regional Entity will record a new issue and will take the facts and circumstances into account in determining whether FFT or NOP treatment is warranted.

**B. For lesser risk Possible Violations, the emphasis will be on identifying them and ensuring they are corrected, without subjecting the Registered Entity to the full panoply of the CMEP. Upon correction and submittal of Registered Entity's statement of completion of mitigating activities, such Possible Violations will become, and be referred to as, Remediated Issues. Remediated Issues will be included in a FFT spreadsheet format provided monthly to FERC as an informational filing. The submittal to FERC of the informational filing will conclude NERC and Regional Entity processing of Remediated Issues, subject to verification activities as warranted.**

**C. The issue is considered a part of the entity's compliance history.**

- 1) The Possible Violation and related facts and circumstances are taken into account as part of this consideration, and in consideration of future Possible Violations, but a finding of a violation has not been made. Rather, there is simply a determination that it is a Possible Violation.

**D. No penalty or sanction will be assigned to an issue addressed using the FFT approach.**

**E. Repeat Possible Violations of same, similar or different standards do not foreclose use of the FFT approach.**

- 1) The identification of repeat Possible Violations of same, similar or different standards may lead the CEA to use its discretion to discontinue the use of the FFT process and escalate the processing of these Possible Violations as Possible Violations as described in the CMEP.

**F. Formal Mitigation plans will not be required for Possible Violations addressed through the FFT approach but there must be a demonstration that the issue has been addressed and corrective actions must be described and evidence delineated to facilitate later verifications.**

- 1) The formal Mitigation Plan template and milestone reporting requirements will not be required for FFT; it will be paramount that corrective actions will be tracked to completion and will be subject to verification by the Regional Entity.
- 2) NERC already has in place precedent where formal Mitigation Plans and processing are not required. Currently, Administrative Citation NOP and Settlement Agreements do necessarily result in separate mitigation plans.
- 3) Where they are recorded in the spreadsheet, they will be assigned a Mitigation Identification Tracking Number. Mitigating activities included in FFT submittals to FERC will be deemed as accepted by Regional Entities and approved by NERC at the time of filing.

## **Attachment 2**

(Available on the NERC Website at  
[http://www.nerc.com/fileUploads/File/Filings/Attachments\\_Initial\\_FFT\\_Filing.pdf](http://www.nerc.com/fileUploads/File/Filings/Attachments_Initial_FFT_Filing.pdf))



**Attachment 3**

**Notice of Filing**

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corp. )

Docket No. RC11-\_ -000

NOTICE OF PETITION REQUESTING APPROVAL OF NEW ENFORCEMENT  
MECHANISMS AND SUBMITTAL OF INITIAL INFORMATIONAL FILING REGARDING  
NERC'S EFFORTS TO REFOCUS IMPLEMENTATION OF ITS  
COMPLIANCE MONITORING AND ENFORCEMENT PROGRAM

( )

Take notice that on September 30, 2011, North American Electric Reliability Corp. ("NERC") filed a Petition Requesting Approval of New Enforcement Mechanisms and Submittal of Initial Informational Filing Regarding NERC's Efforts to Refocus Implementation of Its Compliance Monitoring and Enforcement Program.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, D.C. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose  
Secretary